(22,357)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 150.

FRANK LUKE AND JOHN LUKE, APPELLANTS,

vs.

JESSE HOYT SMITH.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

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a In the Supreme Court of the State of Arizona.

No. 1123.

FRANK LUKE and JOHN LUKE, Appellants,
vs.
JESSE HOYT SMITH, Appellee.

Joseph H. Kibbey, Esq., and Walter Bennett, Esq. (of the law firm of Kibbey, Bennett & Bennett), attorneys for Appellants.
C. F. Ainsworth, Esq., and Lewis M. Ogden, Esq., attorneys for Appellee.

On Appeal from the District Court of the Third Judicial District of the Territory of Arizona in and for Maricopa County.

Be it remembered that on to-wit: the twenty-ninth day of July, 1909, came the appellants in the above entitled cause, by their attorneys, and filed in the Clerk's office of said court, in said entitled cause, a certain Abstract of Record, in words and figures following, to-wit:

1 ABSTRACT OF RECORD.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JESSE HOYT SMITH, Plaintiff,
vs.
WILLIAM J. RAINEY and LILLIAN RAINEY, His Wife, and FRANK LUKE, Defendants.

Original Complaint.

Comes now the above-named plaintiff, and for cause of action respectfully shows to this Court:

First. That he, said plaintiff, and the defendants, William J. Rainey and Lillian Rainey, his wife, are each and all
2 non-residents of the Territory of Arizona. That the defendant Frank Luke resides in the City of Phœnix, County of Maricopa and Territory of Arizona.

Second. That on or about the 20th day of March, 1897, the plaintiff and the defendant William J. Rainey became the owners in fee simple of the following described property; the plaintiff being the purchaser of a two-thirds interest and the defendant William J. Rainey being the purchaser of the remaining one-third interest in the said property, to-wit:

Section 22, Township 2 North, Range 3 East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona; except the

Northwest one-quarter (N. W. ¼) of the Northwest one-quarter (N. W. ¼) of said section.

Third. That the purchase price for said property was the sum of Eighteen Thousand (18,000) Dollars, all of which said sum was advanced and paid by this plaintiff.

Fourth. That on the same day, to-wit, on said 20th day of March, 1897, this plaintiff and the said defendant, William J. Rainey, duly entered into a written contract wherein and whereby it was among other things agreed that this plaintiff and said defendant having joined in the purchase of said property for the purpose of platting, grading and otherwise improving said property, and as so improved to sell and dispose of the same, that this plaintiff should advance all the money necessary for the improvement of the said
3 property as contemplated by said agreement, and that this plaintiff should be repaid for all such moneys so advanced by him either in the purchase of the said property, or in advances made for the improvement of said property, as rapidly as possible from the receipts from the sale or sales or other income of said property until the same shall be fully paid with interest at six per cent per annum. And it was therein further agreed that all moneys so advanced by this plaintiff as aforesaid shall be considered as loans made by him, and that if after five years from the date of said agreement, all the money or any portion thereof so advanced shall not have been repaid to this plaintiff, with interest as hereinabove set forth, then that said defendant William J. Rainey agrees to pay on demand thereafter to said plaintiff herein, one-third (1/3) of all such loans then unpaid, including interest thereon as aforesaid.

Fifth. That this plaintiff has since said 20th day of March, 1897, advanced for the purchase of the above described property and for the improvement thereof, various sums of money, aggregating in all with interest thereon at 6 per cent per annum, *to* the sum of Sixty-five thousand three hundred and sixteen and 51-100 (65,316.51) dollars, and that no part of said sum has been repaid to this plaintiff, although demand has been heretofore made upon the said defendant William J. Rainey for the repayment of one-third of said amount so advanced, as in said above-mentioned agreement provided,
4 but that said defendant refused and still refuses to pay the aforesaid one-third of the sum so advanced by this plaintiff.

Sixth. That this plaintiff has done and performed each, every and all the agreements and stipulations set forth in the said agreement above referred to, on his part to be performed, but that said defendant has for some time past and still neglects to do and perform any of the covenants and agreements in said agreement mentioned, and refuses to further carry out said agreement.

Seventh. That the defendants Lillian Rainey and Frank Luke each claim to have some lien or interest in, on and upon the interest of the said defendant William J. Rainey in said property hereinabove described, which liens, if any there be, are each and all subject and subordinate to the lien of this plaintiff.

Wherefore, this plaintiff prays the judgment of this Court:

First. That he be declared to have an equitable mortgage lien in

and upon the interest of the said William J. Rainey in the property hereinabove described, to the amount of $21,772.17, said sum being one-third of the amount advanced by this plaintiff as hereinbefore set forth, with interest thereon figured up to the 23rd day of May, 1903, and that such mortgage lien shall in addition extend to all interest accruing up to the time of payment thereof and to the costs and disbursements incurred herein.

5 Second. That this plaintiff be declared to have a mortgage lien upon the interest of said William J. Rainey in the property hereinbefore described, which lien is prior and superior to that of the defendants herein (said Lillian Rainey and said Frank Luke), if any they have.

Third. That this plaintiff have judgment of this Court against the said defendant for the full amount so found due him, together with the costs and disbursements incurred by him herein.

Fourth. That the defendants Lillian Rainey and Frank Luke and William J. Rainey be foreclosed of all right, title, interest and equity in and to the said interest of the said William J. Rainey in and to the property above described, and that said interest of the said William J. Rainey in the property above described be decreed by this Court to be sold as under execution, and out of the proceeds of such sale this plaintiff be paid the amount found due him, together with interest and the costs and disbursements incurred herein.

Fifth. That this plaintiff have such other and further judgment and relief as may seem meet and equitable, in the premises.

C. F. AINSWORTH,
Plaintiff's Attorney.

Filed July 18th, 1903.

6 *First Amended Complaint.*

JESSE HOYT SMITH, Plaintiff,
vs.
WILLIAM J. RAINEY and LILLIAN RAINEY, His Wife; FRANK LUKE and JOHN LUKE, Defendants.

Comes now the above-named plaintiff, and by this his amended complaint herein, respectfully shows to this Court:

First. That he the said plaintiff, and the defendant William J. Rainey and defendant Lillian Rainey, are each and all non-residents of the Territory of Arizona; that the defendant Frank Luke and John Luke reside in the City of Phœnix, County of Maricopa and Territory of Arizona.

Second. That on or about the 20th day of March, 1897, the plaintiff and the defendant William J. Rainey, pursuant to and in accordance with the agreement hereinafter referred to and subject to the terms, stipulations, conditions and agreements therein contained, purchased the following described property, to-wit:

Section twenty-two (22), Township 2 North, Range Three (3) East of the Gila and Salt River Base and Meridian, Maricopa County,

except the northwest quarter (N. W. ¼) of the northwest one-quarter (N. W. ¼) of said section.

7 The said plaintiff receiving on said purchase a two-third undivided interest, and the said defendant William J. Rainey receiving a one-third undivided interest in the said property above described.

Third. That the purchase price for said property was the sum of Eighteen Thousand ($18,000) Dollars, all of which said sum was paid by the plaintiff herein.

Fourth. That on said 20th day of March, 1897, this plaintiff and the said defendant William J. Rainey, duly entered into a written agreement between themselves, wherein and whereby it was among other things agreed that this plaintiff and said defendant William J. Rainey having joined in the purchase of the above described property for the purpose of platting, grading and otherwise improving said property, and as so improved, to sell and dispose of the same, that this plaintiff should advance all the money necessary for the purchase and improvement of the above described property as contemplated by said agreement, and that this plaintiff should be repaid for all such moneys so advanced by him, either in the purchase or improvement of said property, as rapidly as possible, from the receipts from the sale or sales or other income of said property until the same shall have been fully repaid to this plaintiff, with interest on such moneys at six per cent per annum. And it was therein also agreed that all the moneys so advanced by this plaintiff as aforesaid shall be considered as loans made by him, and further

8 that if after five years from the date of said agreement, all the money or any portion thereof so advanced, shall not have been repaid to this plaintiff, with interest as hereinabove set forth, then, that said defendant William J. Rainey agrees to pay on demand thereafter to said plaintiff herein one-third (⅓) of all such loans then unpaid, including interest thereon as aforesaid.

Fifth. That this plaintiff has since said 20th day of March, 1897, advanced for the purchase of the above described property and for the improvement thereof, pursuant to the aforesaid agreement, various sums of money, aggregating in all with interest thereon at 6 per cent per annum, figured up to the 23rd day of May, 1903, the sum of Sixty-five thousand three hundred and sixteen and 51-100 ($65,316.51) Dollars, and that no part of said sum has been repaid to this plaintiff, although demand has been heretofore made upon said defendant William J. Rainey for the repayment of one-third of said amount so advanced, as in said above-mentioned agreement provided, but that said defendant refused and still refuses to pay the aforesaid one-third of the sum so advanced by this plaintiff.

Sixth. That this plaintiff has done and performed each, every and all the agreements and stipulations set forth in the said agreement above referred to, on his part to be performed, but that said defendant has for some time past and still neglects to do and perform any of the covenants and agreements in said agreement mentioned, and refuses to further carry out said agreement.

Seventh. That there is now due and owing from the said defendant William J. Rainey the sum of $21,772.17, with interest thereon from the 23rd day of May, 1903, at the rate of 6 per cent per annum.

Eighth. That the defendants Lillian Rainey, Frank Luke and John Luke each claim to have some lien or interest in, on or upon the interest of the said defendant William J. Rainey in said property hereinabove described, which liens, if any there be, are each and all subject and subordinate to the lien of this plaintiff.

Wherefore, this pla[illegible] prays the judgment of this court:

First. That he have and recover of and from the defendant William J. Rainey the sum of $21,772.17, with interest thereon from the 23rd day of May, 1903, besides the costs and disbursements of this action.

Second. That plaintiff be adjudged to have an equitable mortgage lien upon the interest of the said William J. Rainey in the property hereinabove described, to the extent of the amount found due from the said William J. Rainey to this plaintiff; and that said lien be adjudged to have accrued and become valid and subsisting against the interest of the said William J. Rainey in the property above described, since the 20th day of March, 1897; and that the liens or other interest of the other defendants Lillian Rainey, Frank Luke and John Luke, in and upon the interest of the defendant William J. Rainey in the property hereinabove described, if any there be, shall be adjudged to be subject and subordinate to the lien of this plaintiff herein.

Third. That the defendants Lillian Rainey, William J. Rainey, Frank Luke and John Luke be foreclosed of all right, title, interest and equity in and to the said interest of the said William J. Rainey in and to the property hereinabove described, and that the said interest of the said William J. Rainey in the property hereinabove described be decreed by this Court to be sold as under execution, and out of the proceeds of such sale this plaintiff be paid the amount found due him, together with interest and the costs and disbursements incurred herein, including expense of sale.

Fourth. That this plaintiff have such other and further relief and judgment of this Court as may seem meet and equitable in the premises.

C. F. AINSWORTH,
Plaintiff's Attorney.

Filed September 23rd, 1903.

Second Amended Complaint.

[Title of Court and Cause.]

Comes now the above-named plaintiff — by this his second amended complaint herein, complains of the defendants and alleges:

First. That said plaintiff and the said defendants William J. Rainey and Lillian Rainey, his wife, are each and all non-residents of the Territory of Arizona. That said defendants Frank Luke and John Luke reside in the City of Phœnix, County of Maricopa and Territory of Arizona.

Second. That said defendant Lillian Rainey was at all the time hereinafter mentioned and now is the wife of the said defendant William J. Rainey.

Third. That on or about the 20th day of March, 1897, the said plaintiff and the said defendant William J. Rainey entered into a written agreement for the joint purchase, management, control and sale of certain real property, described as Section numbered twenty-two (22), in Township Two (2) North of Range numbered three (3) East of the Gila and Salt River Base and Meridian, in the County of Maricopa, in the Territory of Arizona, except the northwest quarter of the northwest quarter of said section; which said agreement was executed and delivered by the said plaintiff and the said defendant William J. Rainey, a copy of which is hereunto annexed marked "Exhibit A," and made a part hereof, to the same extent as if herein set forth.

Fourth. That pursuant to the terms of said agreement this plaintiff advanced all the purchase price of said property hereinabove described, to-wit, $18,000, and in addition thereto, advanced for the improvement thereof, pursuant to said agreement, various sums of money, aggregating in all, with interest thereon, at the rate of six per cent per annum, figured up to the 23rd day of May,
12 1903, to the sum of Sixty-five thousand three hundred and sixteen and 51-100 ($65,316.51) Dollars, and that since said 23rd day of May, 1903, said plaintiff has so advanced the additional sum of One thousand and eighty-five ($1085) Dollars, no part of which said several sums has ever been repaid to this plaintiff.

Fifth. That all of the money so advanced as aforesaid by the plaintiff herein, was used in the purchase and improvement of the property hereinbefore described, including the undivided one third interest therein of the defendant William J. Rainey, and was so advanced under and pursuant to the terms and stipulations in said agreement hereunto annexed, contained.

Sixth. That this plaintiff has done each and every of the agreement and stipulations set forth in said agreement, on his part to be performed, but that said William J. Rainey, defendant, has for some time past neglected and refused and still neglects and refuses to do or perform any of the covenants and agreements in said agreement mentioned.

Seventh. That none of the property above described has ever been sold or disposed of, and no part of the money so advanced as aforesaid by the plaintiff herein, has ever been repaid to this plaintiff, and all of said sums of money so advanced, are still due to this plaintiff.

Eighth. That the defendants Lillian Rainey, Frank Luke and John Luke each claim to have some lien or interest, in, on or
13 upon the interest of the defendant William J. Rainey in the property hereinabove described, which liens if any there be, are each and all subject and subordinate to the lien of this plaintiff.

Wherefore this plaintiff prays the judgment of this court:

First. That this plaintiff be declared to have an equitable mortgage lien in and upon the interest of the said William J. Rainey in the property hereinbefore described, to the extent of one-third of the

several sums so advanced by the plaintiff herein for the purchase and improvement of the said property herein described, together with interest thereon, to wit: for the sum of $21,722.17 with interest thereon from the 23rd day of May, 1903, and $361.66 with interest thereon, at the rate of six per cent per annum.

Second. That said mortgage lien or equitable lien be declared to be prior and superior to any liens claimed by the defendants herein, if any they have.

Third. That this plaintiff have the judgment of this court foreclosing said equitable lien upon the interest of the said defendant William J. Rainey in the property herein described, for the full amount of said lien; that the defendants William J. Rainey, Lillian Rainey, Frank Luke and John Luke be foreclosed of all right, title, interest and equity in and to the said interest of the said William J. Rainey in and to the property herein described, and that said interest of the said William J. Rainey in the property herein
14 described, be decreed by this court to be sold as under an execution, and out of the proceeds of such sale this plaintiff be paid the amount found due him, together with the costs and disbursements incurred herein.

Fourth. That this plaintiff have such other and further relief and judgment as to this court may seem just and equitable.

C. F. AINSWORTH,
Plaintiff's Attorney.

EXHIBIT A.

Memorandum of Agreement.

This Memorandum of Agreement, Made this 20th day of March, 1897, by and between Jesse Hoyt Smith, of Milwaukee, Wisconsin, and William J. Rainey, of Cleveland, Ohio, parties hereto,

Witnesseth; that whereas the said parties have this day purchased a certain tract of land known as Section 22 Township 2, North, Range 3 East of G. and S. R. Meridian, Maricopa County, Arizona, except the N. W. ¼ of the N. W. ¼ of said Section, for the sum of Eighteen Thousand Dollars ($18,000) in cash, said tract of land having been purchased by the said parties in the proportion of an undivided two-thirds (2-3) interest to the said Jesse Hoyt Smith and an undivided one-third (1-3) interest to the said William J. Rainey according to a deed now on record in the office of the County Recorder of Maricopa County, Arizona, in book 43 of Deeds, pages 565-6-7;

15 And Whereas the said tract of land was so conveyed free and clear of all liens and incumbrances, and the full consideration for the whole thereof, being Eighteen Thousand Dollars ($18,000) was paid in cash by said Jesse Hoyt Smith, and said William J. Rainey has agreed to repay to said Jesse Hoyt Smith the one-third (1-3) thereof with interest thereon at six per cent. per annum as hereinafter provided;

And Whereas said parties have joined in said purchase for the

purpose of platting, grading and otherwise improving said property, and as so improved selling and disposing of the same at a profit.

Now therefore, the parties hereto do, and each for himself doth, agree with the other in the manner following:

First. That the improvement of said tract of land shall be commenced not later than the 1st day of January, 1898, and such improvements be thereafter continued with reasonable diligence and dispatch until the same shall be in marketable condition as lots.

Second. That the improvements aforesaid shall consist of the surveying and platting the entire tract into lots, the opening up and grading of all the streets; the planting of suitable shade, ornamental and fruit trees, and the making of all such other improvements as may be hereafter agreed upon between the parties hereto.

Third. That said Jesse Hoyt Smith, in addition to the sum of Eighteen Thousand Dollars ($18,000) so advanced by him as
16 aforesaid, shall also from time to time make all necessary advances of money for the improvements aforesaid, and also all such as shall be required for the running and incidental expenses of the undertaking, including taxes, irrigation charges, marketing said lots and the reasonable and necessary expenses of said William J. Rainey from Cleveland, Ohio, to Phœnix, Arizona, and return, and his living expenses when in Arizona while engaged in business relating to said property.

Fourth. That all money advanced by said Jesse Hoyt Smith in said purchase, as well as all such as shall be hereafter advanced by him for any of the purposes aforesaid, shall be considered and treated as a loan or loans by him, and shall be paid to him as rapidly as possible from the receipts from the sale or sales or other income of said property until the same shall be fully paid, with interest at six per cent per annum, and before any division of profits shall be made or paid.

Fifth. That if at the date of five (5) years from the date hereof, all the loans aforesaid shall not have been fully paid to said Jesse Hoyt Smith, with interest as above provided, then and in that event said William J. Rainey hereby agrees that he will on demand thereafter pay to said Jesse Hoyt Smith the one-third (1-3) of all such loans then unpaid, including interest thereon as aforesaid.

Sixth. That said William J. Rainey shall have general
17 management of said tract of land, including the improvements thereof as aforesaid, and the employment of all labor and making of all contracts necessary therefor, and also including the handling and sale of said lots when so improved; provided, however, that no contracts or other obligation on account of said property exceeding in the aggregate the sum of Five Thousand Dollars ($5,000.00) shall be entered into without the previous written consent of said Jesse Hoyt Smith, and no contract for the sale of any such lots shall be made except at prices and on terms to be agreed upon between the parties hereto; provided always that said William J. Rainey shall at all times and from time to time give to said Jesse Hoyt Smith true accounts of all transactions relating to the business, and full information in regard to all matters which shal- come to

his hands or knowledge *ters which shall come to his hands or knowledge* — -gard to his wishes and directions respecting the same.

Seventh. That said William J. Rainey shall keep full, true, correct and proper books of account of all the transactions and dealings relating to said business, which shall at all times be open to the inspection of said Jesse Hoyt Smith; and that he will on the 10th day of each month render to said Jesse Hoyt Smith an account in full of all transactions during the preceding month, including all contracts made and all disbursements and receipts, and showing all the assets and liabilities of the partnership.

18 Eighth. That said William J. Rainey hereby agrees to accept the said general management of said tract of land, without other consideration or remuneration excepting only his one-third (1-3) share in the net profits of such business as is hereinafter provided.

Ninth. That after the repayment to said Jesse Hoyt Smith of the said sum of Eighteen Thousand DoDllars ($18,000) sa advanced by him for the purchase of said tract and the repayment of all advances which shall be hereafter made by him on account of said property or said business, together with interest on all such sums at six (6) per cent per annum, the net profits of said land and business shall be divided between the parties hereto as follows: Said Jesse Hoyt Smith shall be entitled to the two-thirds (2-3) thereof, and said William J. Rainey the one-third (1-3) thereof; and the losses, if any, shall be shared between the parties in ratio aforesaid.

It is further agreed and understood between the parties hereto that this Memorandum of Agreement is made for the purpose of stating explicitly the terms of co-partnership on which the said Jesse Hoyt Smith and William J. Rainey have joined in the purchase, improvement and sale of said tract or lots, and that each will fulfill in food faith and to the best of his ability the articles herein contained. Which covenants and agreements shall extend to and bind the respective parties and their respective legal representatives.

19 In witness whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

J. HOYT SMITH. [SEAL.]
WM. J. RAINEY. [SEAL.]

In Presence of

J. W. DADMUN.
Z. M. CHANDLER.

Filed December 31st, 1903.

Answer to Second Amended Complaint.

[Title of Court and Cause.]

Come now the defendant-, Frank Luke and John Luke, and answering plaintiff's amended complaint for themselves alone:

I.

Demur to plaintiff's amended complaint and show to the court that said complaint does not state facts sufficient to constitute any cause of action against said defendants or either of them, or for any relief whatever as against said defendants or either of them.

II.

Demurring specially to said amended complaint, these de-
20 fendants show that it appears upon the fact of said complaint that there is a defect of parties defendant in this, that these defendants are not proper parties defendant in this action.

And should the above demurrer be overruled, these defendants, answering plaintiff's amended complaint:

I.

Show to the Court that they have no knowledge or information regarding the matters and things alleged and set forth in paragraphs 2, 3, 4, 5, 6 and 7 of plaintiff's said amended complaint and therefore deny same.

II.

These defendants further answering, admit that they claim to have an interest in and lien upon the premises described in plaintiff's said complaint, and deny that their interest in said premises is subject and subordinate to any lien upon or interest in said premises held by plaintiff.

III.

These defendants further answering plaintiff's said complaint, allege: That on, to-wit, June 11, 1902, the defendant, J. W. Rainey, was the owner of and held in his own name the title of record to, and was in the possession of an undivided one-third interest in and to Section 22, Township 2 North, Range 3 East of the Gila
21 and Salt River Base and Meridian, Maricopa County, Arizona; except the northwest one-quarter of the northwest one-quarter of said section.

That on the day last aforesaid, the said defendant, W. J. Rainey, being indebted to Frank Luke and John Luke, these defendants, in the sum of $2500.00, with interest thereon at 6 per cent from April 1, 1902, the said Frank Luke and John Luke commenced an action in this Court against the said defendant W. J. Rainey to cover the said sum and interest as aforesaid. That in said action the plaintiffs therein sued out of this Court a writ of attachment for the said sum of $2500, and interest as aforesaid, against the goods, chattels, real estate and property of the said W. J. Rainey to secure the said sum of $2500 and interest as aforesaid, and caused the same to be delivered to the sheriff of Maricopa County for service. That on, to-wit, the 11th day of June, 1902, the said sheriff of Maricopa County, by virtue of the said writ of attachment, duly seized and

levied the said writ of attachment upon, and attached all the right, title and interest of the said J. W. Rainey in and to the premises above described, and on the day last aforesaid filed a copy of the said writ of attachment, together with a description of the property attached, with the county recorder of said Maricopa County, and the same was on the day last aforesaid duly filed by him and recorded in said recorder's office in a book kept by him for that purpose.

That thereafter such proceedings were had in said cause
22 that on, to-wit, June 11, 1903, the said Frank Luke and John Luke recovered a judgment from the said W. J. Rainey for the sum of $2500 with interest thereon at the rate of 6 per cent per annum from April 1, 1902, together with the costs of said action, and which judgment foreclosed the lien of said attachment upon the premises hereinbefore described as the same existed on June 11, 1902, and ordered and directed that the said premises be sold as under execution to satisfy said judgment. That at the time of the commencement of this action said judgment still remained of record in this Court, wholly unpaid, unsatisfied and undischarged.

That since the commencement of this action, and since the filing of the defendant Frank Luke's answer to the plaintiff's original complaint, to-wit, on the 6th day of August, 1903, an order of sale was duly issued out of this Court in the cause hereinbefore mentioned, directed to the Sheriff of Maricopa County, Arizona, commanding him to seize and sell as under execution the premises and property hereinbefore mentioned, to satisfy said judgment, and that by virtue of said order of sale, the said sheriff did seize the said premises and property, and, pursuant to a notice duly published and posted as required by law, did, on the 8th day of September, 1903, sell the said premises and property at public auction at the front door of the court house in Phœnix, Maricopa County, Arizona, to the highest and best bidder, and that the defendants, Frank Luke and John Luke, were the purchasers at said sale, and that thereupon the said sheriff executed and delivered to said defendants, Frank
23 Luke and John Luke, the usual certificate of purchase of said premises, and that thereafter on, to-wit, the 20th day of June, 1904, no redemption of said premises from said sale had been made, and that on said last mentioned date the said Frank Luke and John Luke being the owners and holders of said certificate of sale, the sheriff of Maricopa County, Arizona, executed, acknowledged and delivered to the said Frank Luke and John Luke a Sheriff's Deed to said premises, and that the said Frank Luke and John Luke ever since have been and now are the owners of said premises.

That the said Frank Luke and John Luke had not nor had either of them any knowledge or any notice, actual or constructive, of the existence of the alleged contract, a copy of which is attached to plaintiff's complaint as "Exhibit A," at any time prior to the filing of plaintiff's second amended complaint herein, to which a copy of said alleged contract is attached as Exhibit "A" thereof, to-wit, on the 31st day of December, 1903.

Wherefore, these defendants pray that plaintiff take nothing by this action as against these defendants.

That it may be adjudged and decreed that the lien of the attachment and judgment foreclosing the same herein set forth was a prior and superior lien upon the undivided one-third interest of said W. J. Rainey in the premises described in plaintiff's said complaint, to any claim to or interest in said undivided one-third interest
24 which the plaintiff may have by reason of any of the matters and things alleged in his complaint.

And that by said sheriff's sale and deed of said premises, the defendants John Luke and Frank Luke acquired the title to an undivided one-third interest in the premises described in plaintiff's complaint, as against the plaintiff herein and those claiming by, through or under him.

That these defendants have judgment for their costs and disbursements herein; that these defendants may have such other and further relief as equity may require.

WALTER BENNETT,
Attorney for Defendants Frank Luke and John Luke.

Findings.

[Title of Court and Cause.]

The above entitled action having duly come on for trial on the 11th day of February, 1909, before the above Court, sitting without a jury, the Hon. Edward Kent presiding, the plaintiff appearing by C. F. Ainsworth, his attorney, the defendants William J. Rainey and Lillian Rainey having been duly served with process herein and having appeared and answered by their attorneys, Chalmers & Wilkinson, and the defendant- Frank Luke and John Luke appearing by their attorney, Walter Bennett, and the parties having
25 submitted to this Court their evidence and testimony herein, and the Court being fully advised in the premises, doth find:

Findings of Fact.

1.

That on March 20th, 1897, the plaintiff Jesse Hoyt Smith, and the defendant William J. Rainey, purchased from the Arizona Land and Stock Company, a corporation, the premises described in the plaintiff's complaint for the sum of eighteen thousand ($18,000) dollars; that the *vised in the premises, having on the 27th day* sum of eighteen thousand dollars, all of which said sum was advanced and paid over to said Arizona Land and Stock Company by said Jesse Hoyt Smith on March 20th, 1897, and thereupon the said Arizona Land and Stock Company executed, acknowledged and delivered to said Smith and Rainey a warranty deed to said premises, conveying an undivided two-thirds interest therein to said Smith

and an undivided one-th-rd interest therein to said Rainey; the granting clause in which deed is in the words and figures following, to-wit:

"Have granted, sold and conveyed, and by these presents do sell, grant and convey unto the said Jesse Hoyt Smith, an undivided two-thirds (2-3) interest, and unto the said William J. Rainey an undivided one-third (1-3) interest, of, in and to all those certain premises situated in Maricopa County, Arizona Territory, as follows, to-wit:

26 Section twenty-two (22), Township Two (2) North, Range Three East of the Gila and Salt River Base and Meridian (excepting therefrom the northwest quarter (¼) of the northwest quarter (¼) of said section). Together with seven and one-half (7½) water rights in the Arizona Canal, numbering from one hundred and one (101) to one hundred and eight (108) inclusive, deeded and affixed to said premises."

And that on said 20th day of March, 1897, the said deed was duly recorded in the Recorder's office of said Maricopa County, Arizona.

2.

That during the latter part of April, 1897, namely, on or about April 29th, 1897, the said William J. Rainey and Jesse Hoyt Smith executed the contract in writing bearing date March 20th, 1897, a copy of which is attached to the second amended complaint in this cause.

3.

That on the 28th day of Nevomber, 1898, the said William J. Rainey executed and delivered to one Anthony G. Hubbard a mortgage upon an undivided one-third interest in said premises to secure the payment of a promissory note of said Rainey to said Hubbard for the sum of $3000, of even date therewith, due November 28th, 1901, with interest thereon at the rate of 8½% per annum, which said mortgage contained the following clause, namely: "And

27 the said William J. Rainey hereby covenants that he is well and truly seized of a good and perfect title to the premises above conveyed, in law, in fee simple, and has good right and lawful authority to convey the same to the party of the second part, his heirs and assigns, and that the title so conveyed is clear, free and unencumbered, and that he will warrant and defend the same forever to the party of the second part, his heirs and assigns against all claims whatsoever."

That said mortgage was duly acknowledged and was on December 6th, 1898, recorded in the office of the County Recorder of Maricopa County, Arizona, and was thereafter on the 4th day of October, 1901, released and discharged of record by the mortgagee Anthony G. Hubbard.

4.

That at various times between March 20th, 1897, and May 23, 1903, the said Jesse Hoyt Smith, under the terms of the aforesaid

contract, advanced the further sum of $32,473.35, and that one-third part of such payments and advances so made by the said Jesse Hoyt Smith, together with interest from the date of such several payments and advances, at the rate of 6 per cent per annum, amounts to the sum of $21,772.17, which said sum was due to said Jesse Hoyt Smith from the said William J. Rainey under the terms of said contract, on May 23, 1903.

That since the 23rd day of May, 1903, and prior to the
28 28th day of November, 1903, the said Jesse Hoyt Smith advanced the further sum of $1085, one-third part thereof, together with interest thereon from said 28th day of November, 1903, was on the trial of this action due from the said William J. Rainey to the said Jesse Hoyt Smith; and that the total amount due at the date hereof, from the said William J. Rainey to the said Jesse Hoyt Smith, for principal and interest for such advances, under the terms of said contract, is the sum of Twenty-eight Thousand Two Hundred and Twenty-four and 02-100 Dollars. That no part thereof has been paid to the said plaintiff Jesse Hoyt Smith.

5.

That the said Jesse Hoyt Smith has complied with and fulfilled all of the terms and conditions of said contract on his part to be performed, and that the said William J. Rainey has failed and neglected to perform and carry out the terms and conditions of the said contract on his part to be performed and carried out.

6.

That on June 11th, 1902, the record title to an undivided one-third interest in and to Section twenty-two, Township Two North of Range Three East of the Gila and Salt River Base and Meridian, in Maricopa County, Arizona (except the northwest quarter of the northwest quarter of said section), was in said William J. Rainey by virtue of the deed from the Arizona Land and Stock Com-
29 pany to said Jesse Hoyt Smith and William J. Rainey above mentioned, and that on said last mentioned date the said defendants John Luke and Frank Luke commenced an action in this Court against the said William J. Rainey to recover the sum of twenty-five hundred (2500) dollars, with interest thereon from April 1st, 1902, and that in said action the plaintiffs therein sued out of this Court a writ of attachment for the said sum of $2500 and interest as aforesaid against the property of the said William J. Rainey to secure the said sum of $2500 and interest aforesaid and caused the same to be delivered to the Sheriff of Maricopa County, Arizona, for service. That on the said 11th day of June, 1902, the said Sheriff of Maricopa County, by virtue of the said writ of attachment, duly seized and levied the said writ of attachment upon, and attached all the right, title and interest of the said William J. Rainey in and to the above described premises, and on said day filed a copy of said writ of attachment, together with a description of the property attached, with the County Recorder of Maricopa

County, and the same was on said day duly filed by him and recorded in said Recorder's office in a book kept by him for that purpose.

That thereafter such proceedings were had in said cause that on the 11th day of June, 1903, the said Frank Luke and John Luke recovered a judgment against the said William J. Rainey for the sum of $2500 with interest thereon at the rate of 6 per cent per annum from April 1st, 1902, together with the costs of said
30 action, and which judgment foreclosed the lien of said attachment upon the premises hereinbefore described as the same existed on June 11th, 1902, and ordered and directed that same be sold as under execution to satisfy said judgment.

That on the 6th day of August, 1903, an order of sale was duly issued out of this Court in said cause directed to the Sheriff of Maricopa County, Arizona, commanding him to seize and sell as under execution the premises and property hereinbefore mentioned to satisfy said judgment, and that by virtue thereof, the said Sheriff did seize the said premises and property, and pursuant to a notice duly published and posted as required by law, did, on the 8th day of September, 1903, sell the said premises and property at public auction to the highest and best bidder, and that the defendants Frank Luke and John Luke were the purchasers at said sale, and did purchase the said premises at said sale for the sum of twenty-nine hundred dollars and seventy-six cents ($2900.76), the said amount being the full amount of said judgment and costs, and that thereupon the said Sheriff executed and delivered to said defendants Frank Luke and John Luke the usual certificate of purchase of said premises, and that thereafter on the 29th day of December, 1903, the said Sheriff returned the said execution and order of sale unto the office of the Clerk of this Court, showing the said judgment and said execution and order of sale to be fully satisfied and discharged by the sale of said premises. That thereafter on the 20th day of June, 1904, no redemption of said premises from
31 said sale had been made, and that on the said last mentioned date the Sheriff of Maricopa County, Arizona, executed, acknowledged and delivered to the said Frank Luke and John Luke a Sheriff's Deed to said premises.

7.

That the said contract attached to the said second amended complaint, as Exhibit A thereof, has never been filed for record in the Recorder's Office of Maricopa County, Arizona, and that the said defendants Frank Luke and John Luke had not nor had either of them any knowledge or notice of the existence of said contract at any time prior to the filing of the plaintiff's second amended complaint herein, to which a copy of said contract is attached as Exhibit A, on December 31, 1903, saving and excepting such notice actual or constructive as was imparted to them by the pleadings in this cause, or which the law imputed to them from such pleadings.

Conclusions of Law.

As Conclusions of Law from the above facts the Court finds:

1.

That the plaintiff Jesse Hoyt Smith is entitled to a judgment against the defendant William J. Rainey for the sum of Twenty-eight Thousand Two Hundred and Twenty-four and 02-100
32 Dollars, with interest thereon at the rate of 6 per cent per annum from this date, until paid.

2.

That the contract, a copy of which is attached to the plaintiff's second amended complaint herein, constituted the said Jesse Hoyt Smith and the said William J. Rainey co-partners in respect to the property described in plaintiff's complaint, and thereby constituted the said William J. Rainey a trustee in favor of the said Jesse Hoyt Smith in respect to the undivided one-third interest in the premises described in the plaintiff's complaint, and which were conveyed by the Arizona Land and Stock Company to the said William J. Rainey, and that by virtue thereof the said Jesse Hoyt Smith has a lien upon said undivided one-third interest in and to said premises so conveyed to the said William J. Rainey for the payment of the said sum of $— found due from the said William J. Rainey to the said Jesse Hoyt Smith as aforesaid.

3.

That the said mortgage executed by the said William J. Rainey to said Anthony G. Hubbard, bearing date the 28th day of November, 1898, securing the payment of a promissory note executed by the said Rainey to the said Hubbard for the said sum of $3000, of even date with said mortgage, with interest thereon at the
33 rate of 8½ per cent per annum, on the property mentioned in said mortgage, does not in any manner affect the right of the plaintiff Jesse Hoyt Smith to a lien on said Rainey's interest in said property for the amount found due from said Rainey to said Smith as aforesaid.

4.

That by the filing and service upon them of the original complaint in this action, the said defendants Frank Luke and John Luke are in law charged with constructive notice of all of the provisions of the contract in writing between the said Jesse Hoyt Smith and the defendant William J. Rainey, a copy of which is attached to the second amended complaint herein, and sufficient reference to which and of the contents of the same was made and set forth in the original complaint herein; and that by reason thereof the said defendants Frank Luke and John Luke were in law charged

with notice of all of the provisions of said contract, prior to the purchase by them of the one-third interest of the defendant William J. Rainey in the premises described in the plaintiff's complaint herein, at the Sheriff's sale thereof, under the execution and order of sale issued out of this Court in Case Number 3958, being the case of Frank Luke and John Luke vs. William J. Rainey, hereinbefore mentioned.

5.

That the lien of the plaintiff Jesse Hoyt Smith on the
34 undivided one-third interest in the premises mentioned in the plaintiff's complaint and conveyed to the said defendant Rainey by the deed of the Arizona Land and Stock Company hereinbefore mentioned, is prior and superior to the lien and interest therein acquired by the said defendants Frank Luke and John Luke by virtue of the attachment, judgment and Sheriff's sale of said premises to them, in the case of Frank Luke and John Luke against William J. Rainey, hereinabove mentioned.

6.

That the plaintiff is entitled to the judgment of this Court against the said defendant William J. Rainey for the sum of Twenty-eight Thousand Two Hundred and Twenty-four and 02-100 ($28,224.02) Dollars, together with interest thereon from the date hereof at the rate of 6 per cent per annum until paid, together with his costs and disbursements incurred herein, and that the said amount be adjudged a lien upon the undivided one-third interest of the said William J. Rainey in and to the premises described in the complaint herein, as the same existed on the 20th day of March, 1897, together with a foreclosure of said lien, and that an order of sale issue by the Clerk of this Court to the Sheriff or any constable of Maricopa County, Arizona, commanding him to seize and sell the said property, as in case of execution in satisfaction of the same.

Let the judgment be entered accordingly.
35 Dated Phœnix, Arizona, March 27th, 1909.

EDWARD KENT, *Judge.*

Filed April 16th, 1909.

Judgment.

[Title of Court and Cause.]

The above entitled action having duly come for trial on the 11th day of February, 1909, before the above Court sitting without a jury, the Hon. Edward Kent presiding, the plaintiff appearing by C. F. Ainsworth, his attorney, and the defendants William J. Rainey and Lillian Rainey having been duly served with process and having appeared and answered by their attorneys, Chalmers & Wilkinson, and the defendants Frank Luke and John Luke appear-

ing by their attorney, Walter Bennett, and the parties having submitted to this Court their evidence and testimony herein, and the Court, after being fully advised in the premises, having on the 27th day of March, 1909, duly made and filed herein its findings of fact and conclusions.

Now, therefore, on motion of the plaintiff's attorney,

It is by the court ordered, adjudged and decreed, that the plaintiff Jesse Hoyt Smith have and recover of and from the defendant William J. Rainey the sum of Twenty-eight Thousand Two Hundred and Twenty-four and 02-100 ($28,224.02) Dollars,

36 with interest thereon at the rate of six per cent per annum from this date, together with his costs and disbursements herein, taxed at the sum of $—.

It is further ordered and adjudged, that the said plaintiff herein has a superior and prior lien on the undivided one-third interest in and to the property described in the complaint herein, heretofore owned by the said William J. Rainey, and the legal title to which is now held by the said defendants Frank Luke and John Luke, to the extent of the aforesaid amounts herein adjudged to be due him from the said defendant William J. Rainey, and that the said lien be and the same is hereby foreclosed, and that an order of sale issue out of this Court to the Sheriff or any constable of the County of Maricopa directing him to seize and sell the same as under execution, in satisfaction of the said judgment; and if the proceeds of such sale be insufficient to satisfy the judgment, then to make the money, or any balance thereof remaining unpaid out of any other property of the defendant William J. Rainey, as in the case of ordinary executions; that out of the proceeds derived from the sale of the aforesaid property one-third interest of the said defendants William J. Rainey and John Luke and Frank Luke, in and to the property hereinbefore described, the plaintiff herein be paid the amount herein found due him, together with accruing costs and costs of sale, and to pay the balance thereof to the defendants John Luke and Frank Luke.

37 It is further ordered and adjudged, that on the sale of said property aforesaid the defendants and each of them and all persons claiming under them or any of them, be and they are hereby forever barred and estopped from claiming any right, title, interest or equity in and to the said property or any part thereof, except the equity and right of redemption as provided by law.

Done in open Court this 27th day of March, 1909.

EDWARD KENT, *Judge.*

Filed April 16th, 1909.

Amended Motion for New Trial.

Come now the defendants Frank Luke and John Luke and move the Court to set aside the decision and judgment of the Court in this cause, and to grant these defendants a new trial herein upon the following grounds:

I.

The Court erred in admitting improper and incompetent evidence offered by the plaintiff and objected to by these defendants.

II.

The Court erred in refusing to admit proper and competent evidence offered by these defendants.

38

III.

The Court erred in its conclusion of law No. 2 by declaring that the contract therein referred to constitutes William J. Rainey a trustee in favor of Jesse Hoyt Smith in respect to the undivided one-third interest in the premises described in plaintiff's complaint conveyed by the Arizona Land and Stock Company to said William J. Rainey.

IV.

The Court erred in its conclusion of law No. 4 as follows, viz:

"That by the filing and service upon them of the original complaint in this action, the said defendants Frank Luke and John Luke, are in law charged with constructive notice of all the provisions of the contract in writing between the said Jesse Hoyt Smith and the defendant William J. Rainey, a copy of which is attached to the second amended complaint herein, and sufficient reference to which and of the contents of the same was made and set forth in the original complaint herein; and that by reason thereof the said defendants Frank Luke and John Luke were in law charged with notice of all of the provisions of said contract, prior to the purchase by them of the one third interest of the defendant William J. Rainey in the premises described in the plaintiff's complaint herein. at the Sheriff's sale thereof, under the execution and order of

39 sale issued out of this court in case number 3958, being the case of Frank Luke and John Luke vs. William J. Rainey hereinbefore mentioned."

V.

The court erred in its conclusion of law No. 5 as follows, viz:

"That the lien of the plaintiff Jesse Hoyt Smith on the undivided one third interest in the premises mentioned in the plaintiff's complaint and conveyed to the said defendant Rainey by the deed of the Arizona Land and Stock Company hereinbefore mentioned, is prior and superior to the lien and interest therein acquired by the said defendants Frank Luke and John Luke by virtue of the attachment, judgment and Sheriff's sale of said premises to them, in the case of Frank Luke and John Luke against William J. Rainey hereinabove mentioned."

VI.

The findings of fact are contrary to the evidence in the case.

VII.

The conclusions of law are not warranted by the facts found by the Court, or by the evidence in the case.

VIII.

The judgment of the Court is not supported by the find-
40 ings of fact or by the facts proven by the evidence in the case.

IX.

The judgment of the Court is contrary to the law and the evidence.

WALTER BENNETT,
Attorney for Defendants Frank Luke and John Luke.

Minute Entries.

[Title of Court and Cause.]

Be it remembered, that heretofore and on, to-wit, the 4th day of December, A. D. 1908, the same being one of the regular judicial days of the October Term, A. D. 1908, of said Court, the following order, inter alia, was had and entered of record in said Court in the above-entitled cause, which said order is in words and figures as follows, to-wit:

4129.

JESSE HOYT SMITH, Plaintiff,
vs.
WM. J. RAINEY et al., Defendant-.

At this day, pursuant to the mandate from the Supreme Court, it is ordered by the Court that the demurrer of the defendant- Luke herein be overruled.

And afterwards and upon, to-wit, the 5th day of Decem-
41 ber, A. D. 1908, the same being one of the regular judicial days of the October Term, A. D. 1908, of said Court, the following order, inter alia, was made and entered of record in the said Court in said cause, which said order is in words and figures as follows, to-wit:

4129.

JESSE HOYT SMITH, Plaintiff,
vs.
WM. J. RAINEY et al., Defendant-.

At this day upon motion of the plaintiff herein, it is ordered by the Court that this case be set for trial January 2nd, proximo.

And afterwards and upon, to-wit, the 16th day of December, A. D. 1908, the same being one of the regular judicial days of the October Term, A. D. 1908, of said Court, the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

4129.

JESSE HOYT SMITH
vs.
W. J. RAINEY et al.

At this day, by consent, it is ordered by the Court that this case be reset for trial February 5th, A. D. 1909.

And afterwards and upon, to-wit, the 4th day of February, A. D. 1909, the time being one of the regular judicial days of the October Term, A. D. 1908, of said Court, the following order, inter
42 alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

4129.

JESSE HOYT SMITH
vs.
W. J. RAINEY et al.

At this day on motion of C. F. Ainsworth, Esq., attorney for the said plaintiff, it is ordered by the Court that L. M. Ogden, Esq., an attorney from the Bar of the Supreme Court of Wisconsin, be allowed to appear in this case for the plaintiff.

And afterwards and upon, to-wit, the same day, the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

4129.

JESSE HOYT SMITH
vs.
W. J. RAINEY et al.

At this day this matter coming on to be heard on the general and special demurrer of the defendants Luke in the amended answer to the amended complaint, the said defendants not pressing their demurrer, it is ordered by the Court that the same be and hereby is overruled.

And afterwards and upon, to-wit, the same day, the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

43 4129.

JESSE HOYT SMITH
vs.
W. J. RAINEY et al.

At this day comes the said plaintiff in his own proper person and by C. F. Ainsworth, Esq., and L. M. Ogden, Esq., his attorneys, and the defendants Frank Luke and John Luke also come in their own proper persons and by Walter Bennett, Esq., their attorney, and thereupon this cause coming on for trial before the Court without a jury on the issues herein joined, comes the evidence both oral and documentary on the part of the plaintiff and defendants, after which the case is argued to the Court by counsel and submitted to the Court for its further consideration.

And afterwards and upon, to-wit, the same day, the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

4129.

JESSE HOYT SMITH
vs.
W. J. RAINEY et al.

At this day it is ordered by the Court that Exhibit "B" be withdrawn after having been compared by the defendants herein.

And afterwards and upon, to-wit, the 27th day of March, A. D. 1909, the same being one of the regular judicial days of the
44 October Term, A. D. 1908, of the said Court, the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

4129.

JESSE HOYT SMITH
vs.
W. J. RAINEY et al.

This cause having been heretofore tried, argued and submitted to the Court for its further consideration, and the Court having considered the same and being now sufficiently advised in the premises, and the parties being now present in Court by their at-

torneys, doth find that plaintiff is entitled to judgment as prayed for in his complaint, together with the foreclosure of his lien.

And it is ordered that a judgment be prepared in accordance with such findings, which when signed by the Court, shall be entered in the judgment book.

And afterwards and upon, to-wit, the 3rd day of April, A. D. 1909, the same being one of the regular judicial days of the October Term, A. D. 1908, of said Court, the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

4129.

JESSE HOYT SMITH
vs.
W. J. RAINEY et al.

At this day by consent it is ordered that defendants' mo-
45 tion for a new trial of this cause be reset for hearing April 10th inst.

And afterwards and upon, to-wit, the 10th day of April, A. D. 1909, the same being one of the regular judicial days of the October Term, A. D. 1908, of said Court, the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

4129.

JESSE HOYT SMITH
vs.
W. J. RAINEY et al.

At this day by consent it is ordered that the motion of the defendants Luke for a new trial of this cause be reset for hearing April 17th inst.

And afterwards and upon, to-wit, the 17th day of April, A. D. 1909, the same being one of the regular judicial days of the October Term, A. D. 1909, of said Court, the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

4129.

JESSE HOYT SMITH
vs.
W. J. RAINEY et al.

At this day by consent it is ordered by the Court that the motion of the defendants Luke for a new trial herein, be resert for hearing

April 24th inst., and for good cause to the Court appearing
46 be continued until the next term of this Court provided by law.

And afterwards and upon, to-wit, the 24th day of April, A. D. 1909, the same being one of the regular judicial days of the April Term, A. D. 1909, of said Court, the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

4129.

JESSE HOYT SMITH
vs.
W. J. RAINEY et al.

At this day this matter coming on to be heard on the motion of the defendants Luke to set aside the judgment herein and for a new trial in this behalf, is argued by counsel and is submitted to the Court for its further consideration.

And afterwards and upon, to-wit, the 15th day of May, A. D. 1909, the same being one of the regular judicial days of the April Term, A. D. 1909, of said Court, the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

4129.

JESSE HOYT SMITH
vs.
W. J. FINEY et al.

This matter having been heretofore submitted to the Court
47 on motion of the defendants Luke to set aside the judgment and for a new trial in this behalf, and by the Court taken under advisement, and having considered the same, and being now fully advised in the premises, the Court doth deny said motion, to which ruling the said defendants then and there duly except.

And afterwards and upon, to-wit, the same day, the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

4129.

JESSE HOYT SMITH
vs.
W. J. RAINEY et al.

At this day come the said defendants Luke by their attorney and in open Court give notice of an appeal to the Supreme Court of

Arizona from the judgment rendered against them herein and the order denying their motion for a new trial.

And afterwards and upon, to-wit, the 22nd day of May, A. D. 1909, the same being one of the regular juridical days of the April Term, A. D. 1909, of said Court, the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

4129.

JESSE HOYT SMITH
vs.
W. J. RAINEY et al.

48 At this day comes the said plaintiff by C. F. Ainsworth, Esq., his attorney, and the defendants Frank Luke and John Luke by Messrs. Kibbey, Bennett & Bennett, their attorneys, also come, and thereupon, upon motion of the said defendants Luke and Luke, of the hearing whereof due notice has been given to the said plaintiff, and upon due consideration the Court fixes the amount of the bond to be executed by the said Lukes upon their appeal to the Supreme Court of the Territory of Arizona from the judgment of this Court against them, to stay the execution thereof against them as to the sale of the lands ordered to be sold, at Seven Thousand Dollars ($7000).

And afterwards and upon, to-wit, the 24th day of May, A. D. 1909, there was filed in the Clerk's office of said Court in said cause, an appeal and supersedeas bond, which said appeal and supersedeas bond, with the endorsements thereon, is in words and figures as follows, to-wit:

In the District Court of the Third Judicial District of the Territory of Arizona, in and for the County of Maricopa.

JESSE HOYT SMITH, Plaintiff,
vs.
WILLIAM J. RAINEY and LILLIAN RAINEY, His Wife; FRANK LUKE and JOHN LUKE, Defendants.

49 Know All Men by These Presents, That we, Frank Luke and John Luke, as principals, and P. T. Hurley, J. W. Walker, Edward Eisele and Joseph Thalheimer as sureties, are held and firmly bound unto Jesse Hoyt Smith in the penal sum of Seven Thousand ($7,000.00) Dollars lawful money of the United States, for which sum well and truly to be paid unto the said Jesse Hoyt Smith, we bind ourselves, our heirs, executors, administrators and assigns jointly, severally and firmly by these presents.

Sealed with our seals and dated this 22nd day of May, 1909.

The conditions of this obligation are such that, whereas, on the 27th day of March, 1909, the said Jesse Hoyt Smith, in a certain cause then pending in the District Court of the Third Judicial District of the Territory of Arizona, in and for the County of Maricopa, wherein said Jesse Hoyt Smith was plaintiff and William J. Rainey, Lillian Rainey, Frank Luke and John Luke were defendants, did recover a judgment against said William J. Rainey for the sum of Twenty-eight thousand two hundred twenty-four 02-100 dollars ($28,224.02) with interest thereon at the rate of six per cent per annum, together with the costs of said action taxed at Thirty-three and 90-100 Dollars, and which said judgment is thereby declared to be a prior and superior lien upon the undivided one-third interest in and to the following described premises, viz.:

Section twenty-two (22), Township Two (2) North, Range Three East of the Gila and Salt River Base and Meridian (excepting therefrom the northwest quarter (¼) of the northwest quarter (¼) of said section). Together with seven and one-half (7½) water rights in the Arizona Canal numbering from one hundred and one (101) to one hundred and eight (108) inclusive, deeded and affixed to said premises, the legal title to which is held by the said Frank Luke and John Luke, and which said judgment directs that an order of sale issue out of said Court to the sheriff or any constable of said Maricopa County, directing him to seize and sell said premises as under execution in satisfaction of said judgment, and

Whereas, the said Frank Luke and John Luke have appealed from said judgment to the Supreme Court of the Territory of Arizona, and desire to stay the sale of said premises under such order of sale, in satisfaction of said judgment, pending said appeal.

Now therefor-, if the said Frank Luke and John Luke shall prosecute their said appeal to effect and in case the judgment of the Appellate Court shall be against *him*, shall pay to the said Jesse Hoyt Smith all damages which he may sustain by the staying of the sale of said premises under such order of sale, in satisfaction of said judgment pending said appeal, and all costs which shall be adjudged against him on such appeal, then this obligation to be void, otherwise to remain in full force and effect.

FRANK LUKE.
JOHN LUKE.
P. T. HURLEY.
J. W. WALKER.
EDWARD EISELE.
JOSEPH THALHEIMER.

TERRITORY OF ARIZONA,
County of Maricopa, ss:

Before me, Ethel Whitlow, a Notary Public, in and for said County, in said Territory, personally came, this 22nd day of May, 1909, P. T. Hurley, J. W. Walker, Edward Eisele and Joseph Thalheimer, sureties on the foregoing appeal bond, and being duly sworn, each for himself and not one for the other, says that he is

worth Seven Thousand ($7,000.00) Dollars over and above his just debts and liabilities, exclusive of property exempt from execution.

P. T. HURLEY.
J. W. WALKER.
EDWARD EISELE.
JOSEPH THALHEIMER.

Subscribed and sworn to before me by each of said affiants, severally, this 22nd day of May, 1909.

Witness my hand and official seal.

[NOTARIAL SEAL.] ETHEL WHITLOW,
Notary Public.

My commission expires February 6th, 1913.

Approved:

EDWARD KENT,
Chief Justice.

52 Endorsements: No. 4129. In the District Court of Maricopa County, Territory of Arizona. Jesse Hoyt Smith, Plaintiff, vs. William Rainey et al., Defendants, Appeal and Supersedeas Bond. Filed May 24, 1909. Elias F. Dunlevy, Clerk. Kibbey, Bennett & Bennett, Attorneys for Defendants Frank Luke and John Luke, Fleming Block, Phœnix, Arizona.

And afterwards and upon, to-wit, the 28th day of May, A. D. 1909, there was filed in the Clerk's office of said Court in said cause, an appeal bond, which said appeal bond, with the endorsements thereon, is in words and figures as follows, to-wit:

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JESSE HOYT SMITH Plaintiff,
vs.
WILLIAM J. RAINEY and LILLIAN RAINEY, His Wife; FRANK LUKE and JOHN LUKE, Defendants.

Know All Men by These Present, That we, Frank Luke and John Luke, as principals, and D. C. Babbitt and Wm. E. Thomas,
53 as sureties, are held and firmly bound unto Jesse Hoyt Smith in the penal sum of Three Hundred ($300.00) Dollars lawful money of the United States for which sum well and truly to be paid unto the said Jesse Hoyt Smith, we bind ourselves, our heirs, executors, administrators and assigns, jointly, severally and firmly by these presents.

Sealed with our seals and dated this 24th day of May, 1909.

The conditions of this obligation are such that, whereas, on the 27th day of March, 1909, the said Jesse Hoyt Smith, in a certain cause then pending in the District Court of the Third Judicial

District of the Territory of Arizona, in and for the County of Maricopa, wherein said Jesse Hoyt Smith was plaintiff and William J. Rainey, Lillian Rainey, Frank Luke and John Luke were defendants, did recover a judgment against said William J. Rainey for the sum of $28,224.02, with interest thereon at the rate of six per cent per annum, together with the costs of said action taxed at — Dollars, and which said judgment is thereby declared to be a prior and superior lien upon the undivided one-third interest in and to the following described premises, viz:

Section twenty-two (22), Township Two (2) North, Range Three East of the Gila and Salt River Base and Meridian (excepting therefrom the northwest quarter (¼) of the northwest quarter (¼) of said section). Together with seven and one-half (7½) water
54 rights in the Arizona Canal, numbered from one hundred and one (101) to one hundred and eight (108) inclusive, deeded and affixed to said premises, the legal title to which is held by the said Frank Luke and John Luke, and which said judgment directs that an order of sale issue out of said Court to the Sheriff or any constable of said Maricopa County, directing him to seize and sell said premises as under execution in satisfaction of said judgment, and

Whereas, the said Frank Luke and John Luke have appealed from said judgment to the Supreme Court of the Territory of Arizona, and the Clerk of the District Court of said Maricopa County, Arizona, has fixed the sum of Three Hundred ($300.00) Dollars as being double the probable amount of the costs of suit in the Appellate Court and said District Court.

Now therefore, if the said Frank Luke and John Luke shall prosecute their said appeal with effect and shall pay all costs which have accrued in said District Court, or which may accrue in said Supreme Court in said cause, then this obligation to be void, otherwise to remain in full force and effect.

FRANK LUKE.
JOHN LUKE.
D. C. BABBITT.
WM. E. THOMAS.

TERRITORY OF ARIZONA,
County of Maricopa, ss:

Before me, George Kirkland, Probate Clerk in and for said
55 County, in said Territory, personally came this twenty-eighth day of May, 1909. D. C. Babbitt, Wm. E. Thomas, sureties on the foregoing appeal bond, and being duly sworn, each for himself and not one for the other, says that he is worth Three Hundred ($300.00) Dollars over and above his just debts and liabilities exclusive of property exempt from execution.

D. C. BABBITT.
WM. E. THOMAS.

Subscribed and sworn to before me by each of said affiants, severally, this 28th day of May, 1909.

Witness my hand and official seal.

[Probate Court Seal.] GEO. KIRKLAND,
Clerk of the Probate Court,
Maricopa County, Arizona.

Endorsements: No. 4129. In the District Court of Maricopa County, Territory of Arizona. Jesse Hoyt Smith, Plaintiff, vs. William J. Rainey et al., Defendants. Appeal Bond. Approved and filed May 28th, 1909. Elias F. Dunlevy, Clerk. Frank B. Cook, Deputy Clerk. Kibbey, Bennett & Bennett, Attorneys for Defendants Frank Luke and John Luke, Fleming Block, Phœnix, Arizona.

56 And afterwards and upon, to-wit, the 28th day of May, the same being one of the regular juridical days of the April Term, A. D. 1909, of said Court, the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

4129.

JESSE HOYT SMITH
vs.
WILLIAM J. RAINEY and LILLIAN RAINEY, His Wife; FRANK LUKE, and JOHN LUKE.

Comes now the plaintiff by Mr. Charles F. Ainsworth, his attorney; come the defendants Frank Luke and John Luke, by Messrs. Kibbey, Bennett & Bennett, their attorneys.

Therefore said defendants Luke present their motion heretofore filed herein for an order directing the Sheriff of this County to return the order of sale heretofore issued in this cause by the Clerk of the Court, and to quash the same, and that the plaintiff be restrained from further proceedings by way of execution of said order of sale entered in this cause.

It being made to appear to the Court that said order of sale so issued as aforesaid had been returned by said Sheriff unto the office of said Clerk since the filing of this motion, and it further appearing that said defendants Frank Luke and John Luke have heretofore executed and filed their bond to stay proceedings herein
57 * as prescribed by law and the order of this Court heretofore made on the premises, and that said bond has been duly approved by this Court, and the Court being sufficiently advised,

It is now ordered that said plaintiff herein refrain from any proceedings to enforce the order of sale made in this cause, and that all proceedings for the execution thereof shall be stayed until the final disposition of the appeal taken by said Frank Luke and John Luke therefrom to the Supreme Court of this Territory.

(Signed) EDWARD KENT.

TERRITORY OF ARIZONA,
County of Maricopa, ss:

I, Elias F. Dunlevy, Clerk of the District Court of the Third Judicial District of the Territory of Arizona, in and for said County, do hereby certify that the above and foregoing contains a true copy of all minutes entries made in the above entitled cause and of the appeal and supersedeas bond and the appeal bond, and that the papers transmitted herewith are all the papers constituting the record of the case except defendants' Exhibit I (the judgment roll of said Court in Case 3958), a copy of the material portions whereof is transmitted herewith in lieu thereof.

Witness my hand and the seal of said Court this 23rd day of June, A. D. 1909.

[SEAL.]

ELIAS F. DUNLEVY,
Clerk of said District Court.

58 Copies of the following designated papers which are contained in the Abstract of Record are omitted from the Transcript on Appeal by direction of attorneys for Appellants:

Reporter's Transcript of Evidence, Exhibit "D" (being Direct and Cross Interrogatories to be propounded to Witness J. W. Dadman and Answers thereto), Exhibit "E" (being Direct and Cross Interrogatories to be propounded to William J. Rainey and Answers thereto), Memorandum regarding Plaintiff's Exhibits, Exhibit "C" (being a Warranty Deed) and Statement regarding Defendants' Exhibits omitted from the Abstract of Record.

59 And on to-wit: the 10th day of January, 1910, being one of the regular juridical days of the January Term of said court, 1910, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

At this day, on motion of Mr. Walter Bennett for appellants, it is ordered by the Court that one and one-half hours be granted for oral argument in this cause and the hearing set for January 15th, 1910.

And on to-wit: the 15th day of January, 1910, being one of the regular juridical days of the January Term of said court, 1910, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

On motion of Mr. C. F. Ainsworth, it is ordered by the Court that Mr. Lewis M. Ogden be admitted for the purpose of argument in this cause.

On motion of Mr. Lewis M. Ogden, it is ordered by the Court

that he be granted leave to file supplemental brief on behalf of appellee.

60 It is further ordered that attorneys for appellants be granted leave to file reply brief.

And on the same day to-wit: the 15th day of January, 1910, being one of the regular juridical days of the January Term of said court, 1910, the following other order was had and entered of record in said cause in words and figures following, to-wit:

Title of Cause.

This cause coming on at this time for hearing was argued by Mr. Walter Bennett for appellants, and Mr. Lewis M. Ogden and Mr. C. F. Ainsworth for appellee, and cause ordered submitted.

And on to-wit: the 17th day of January, 1910, being one of the regular juridical days of the January Term of said court, 1910, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

On motion of Mr. Walter Bennett, attorney for appellants herein, it is ordered by the Court that he be granted leave to make corrections in appellants brief.

61 And on to-wit: the 2nd day of April, 1910, there was filed in the clerk's office of said court in said entitled cause a certain Opinion in words and figures following, to-wit:

In the Supreme Court of the Territory of Arizona.

No. 1123.

FRANK LUKE and JOHN LUKE, Appellants,
vs.
JESSE HOYT SMITH, Appellee.

Appeal from the District Court of Maricopa County; Before Honorable Edward Kent, Judge.

Messrs. Kibbey, Bennett & Bennett, for Appellants.
Mr. C. F. Ainsworth, for Appellee; Mr. Lewis M. Ogden, of counsel.

Opinion, by Campbell, J.

The second amended complaint in this action was before us in Smith v. Rainey, et al., 9 Ariz., 362, 83 Pac., 463, and was held by us not to state a cause of action. Upon appeal to the Supreme Court of the United States, that court held that the agreement between

Smith and Rainey constituted them partners, and gave to Smith a partners' lien upon the land, as a partnership asset; reversed the judgment of this court and remanded it for trial. 209 U. S., 53.

The opinions above indicated set forth the sub-
62 stance of the complaint and of the agreement attached to it. By their answer, the defendants Luke allege that on June 11, 1902, Rainey was the owner of and held in his own name the title of record to and was in possession of an undivided one-third interest in the land described in the complaint; that on that day Rainey, being indebted to the Lukes in the sum of $2,500, with interest, they commenced an action to recover the said sum and interest and sued out an attachment which was duly served and levied upon Rainey's interest in said land, and thereafter duly recorded in the office of the county recorder of Maricopa County; that thereafter, such proceedings were had in the cause that on June 11, 1903, the Lukes recovered a judgment against Rainey for the amount of his indebtedness to them, and which judgment foreclosed the lien of attachment; that on the 6th day of August, 1903, an order of sale was duly issued out of the court, and that on the 8th day of September, 1903, the premises were sold to the Lukes, who, after the expiration of the period of redemption, received a deed therefor from the sheriff. It is further alleged that neither of the Lukes had any knowledge or any notice, actual or constructive, of the existence of the agreement attached to the complaint of the plaintiff, prior to the filing of plaintiff's second amended complaint, which said second amended complaint was filed on the 31st day of December, 1903.

63 The action was tried by the court without a jury, and resulted in a judgment for Smith. The trial court found that the land described in the complaint was purchased by Smith and Rainey in March, 1897, for the sum of $18,000.; that Smith advanced and paid the purchase price; that the title to the land was taken, an undivided two-thirds in the name of Smith and an undivided one-third in the name of Rainey; that at various times between March 20, 1897, and May 23, 1903, Smith, under the terms of the contract attached to the complaint, advanced the further sum of $32,473.35, and that one-third of such payments and advances so made by Smith, together with interest, amounts to the sum of $21,722.17, which said sum was due to Smith from Rainey, under the terms of the contract, on May 23, 1903; that since May 23, 1903, and prior to the 28th day of November, 1903, Smith advanced the further sum of $1,085, and that the total amount due at the time of the trial of the action, from Rainey to Smith, for principal and interest for such advances, under the terms of the contract, is the sum of $23,224.02. The trial court further found the allegations of the answer of the defendants Luke to be true, with the exception of the matter of notice.

As conclusions of law, the court found that Smith is entitled to a judgment against Rainey for the amount due from him to
64 Smith; that the contract, a copy of which is attached to the complaint, constituted Smith and Rainey copartners in re-

spect to the property described in the complaint, and thereby constituted Rainey a trustee in favor of Smith, with respect to the undivided one-third interest in the premises standing in his name; and that by virtue thereof, Smith has a lien upon said land for the payment of the amount found due him from Rainey.

There is another conclusion of law drawn by the court, to which we will hereafter call attention. Judgment was in favor of Smith, against Rainey, in the sum of $28,224.02, and the lien of Smith was adjudged prior in right to that of the defendants Luke. From this judgment the defendants Luke have appealed.

At the common law, the purchaser at an ordinary execution sale takes subject to all outstanding equities of which he had notice at the time of the sale, and this must be considered the rule in this Territory, except as it may have been changed by statute. Therefore, the first question to be considered is the effect to be given our recording statute, Paragraph 749, R. S. 1901, which provides:

"All bargains, sales and other conveyances whatever, of any lands, tenements and hereditaments, whether they may be made for passing any estate of freehold or inheritance or for a term of years; and deeds of settlement upon marriage, whether land, money or other personal thing, and all deeds of trust and mortgages whatsoever, which shall hereafter be made and executed, shall be void as to all creditors and subsequent purchasers for valuable consideration without notice, unless they shall be acknowledged and filed with
65 the recorder, to be recorded, as required by law, or, where record is not required deposited and filed with the recorder; but the same, as between the parties and their heirs, and as to all subsequent purchasers, with notice thereof, or without valuable consideration, shall nevertheless be valid and binding."

Counsel agree that the statute was adopted from the laws of Texas by the legislature of this Territory. The Supreme Court of that state, while uniformly holding that a prior unrecorded conveyance or mortgage creates no rights as against creditors who have obtained liens, had, prior to our adoption of the statute, construed it as not affecting resulting trusts or equitable liens evidence of which is not required or permitted to be recorded. Thus, in Blankenship v. Douglas, 26 Tex., 226, it is said:

"It seems to be well settled that a judgment lien on the land of a debtor is subject to every equity which existed against the land in the hands of the judgment debtor at the time of the rendition of the judgment. And courts of equity, it is said * * * will limit that lien to the actual interest which the judgment debtor has in the estate. * * * If the property in controversy was purchased by John J. Blankenship with the funds of David Blankenship, and for him, then the equitable estate in the land was in said Blankenship, and upon proof of the facts, the land might have been sold under execution for the debts of David Blankenship. * * * This kind of an equity is beyond the contemplation of our statute of registration respecting the rights of creditors."

In Senter v. Lambeth, 59 Tex., 259, the controversy was between an attaching creditor who was without notice at the time his

attachment was levied and at the time when judgment was
66 rendered, but who had notice at the time he purchased at his own execution sale, and the claimant of a vendor's lien. The question involved is thus stated by the court:

"The sole question in the case is whether, under the admitted facts, the lien and rights acquired by virtue of the writ of attachment, judgment and sheriff's sale are superior to those of the appellees, who hold the unrecorded vendor's lien, of which appellants had notice at or before the sale, but of which no notice was had when the writ of attachment was levied or when the judgment was obtained."

The previous decisions of the court are examined, and it is held (quoting from the syllabus, which correctly states the ruling of the court):

"As against a purchaser with notice of a vendor's lien before sale under a judgment which judgment constituted a legal lien on land, a court of equity will confine the operation of the legal lien of the judgment creditor to the actual interest which the judgment debtor had in the estate at the time such legal lien was fixed. The vendor's lien will be protected, though the purchaser, who had notice before his purchase of execution sale, had no actual notice when the judgment lien attached."

Again, in Calvert v. Roche, 59 Tex., 463, it is said:

"As a general proposition, a judgment lien only attaches to the actual interest of the debtor in the land; but on account of our registration laws, ordinarily, if the judgment lien attaches before the creditor has notice of the existence of the unrecorded deed, then such deed is subordinated to the lien, and subsequent notice of the existence of the deed would work no change in the rights of the parties. But when the debtor holds the legal title in trust for others, with whose funds and for whose use it was purchased, then if the purchaser at sheriff's sale made by virtue of such judgment,
has notice of the rights of the cestui que trusts before his
67 purchase, he would acquire no title to the property as against them. This distinction results from the fact that such an equitable right is not subject to or governed by the registration statutes."

This doctrine has repeatedly been affirmed, and as late as Paris v. Burks, 105 S. W., 174, it is said:

"It is true that the statute operates only against claims dependent on instruments which are required or permitted to be recorded, and rights to which the law gives rise in certain states of fact and of which it requires no evidence upon the records or in writing, such as vendors' liens, certain kinds of trusts, and, perhaps, others that might be instanced, are not postponed to the rights of creditors resulting from the mere acquisition of liens by legal process."

We perceive no difference in principle between the equitable rights involved in and protected by the decisions of the Supreme Court of Texas, and the equitable rights of a partner to a lien for money advanced for the purchase and improvement of lands used in carrying out the joint venture. We feel constrained to follow the construction given the statute by the Supreme Court of Texas prior to our

adoption of it, and to hold that Smith's lien is prior to that of the Lukes, and must prevail over it, if they had notice, actual or constructive, of such lien at the time of the sale.

The trial court found that the Lukes, at the time of the sale, had no actual notice, but that they did have constructive notice of Smith's lien. The original complaint in this action was filed July
18, 1903. The sale under the Lukes' judgment occurred Sep-
68 tember 8, 1903; and on December 31, 1903, this second amended complaint was filed. To the second amended complaint, for the first time, was attached a copy of the agreement between Smith and Rainey, and it will be observed that this complaint was filed subsequent to the sale. The original complaint did not set forth sufficient facts to show that Smith was entitled to a partnership lien. It purported to state the substance of a portion of the agreement between Smith and Rainey, and disclosed that the basis of whatever rights Smith had was evidenced by a written contract, and that by reason of that contract, and operations under it he claimed a lien upon the land. Did this pleading convey to the Lukes sufficient information to put them upon inquiry as to Smith's rights, and charge them with constructive notice of the existence of his lien, prior to the sale? There is not so much difficulty in stating the rule as in applying it to a given state of facts. Where one has notice of a fact affecting property which he seeks to purchase, which puts him upon inquiry, he is chargeable with the knowledge which the inquiry, if made, would have revealed; and one is put upon inquiry by notice of a claim which is inconsistent with the title he seeks to obtain, and must exercise due diligence to ascertain the facts upon which the claim is based. In Fidelity Company v. Rail-
road Co., 32 W. Va., 244, it is said that
69 "Whatever is sufficient to put a person on inquiry is considered as conveying notice; for the law imputes a personal knowledge of a fact, of which the exercise of common prudence might have apprised him. When a subsequent purchaser has actual notice that the property in question is encumbered or affected, he is charged constructively with notice of all the facts and instruments, to the knowledge of which he would have been led by inquiry into the encumbrance or other circumstances affecting the property of which he had notice."

The Supreme Court of the United States, after quoting the foregoing, say:

"Vice Chancellor Wigram, in Jones v. Smith, supra, laid it down that cases in which constructive notice had been established, resolved themselves into two classes; first, those in which the party charged had actual notice that the property in dispute was in some way affected, and the court has thereupon bound him with constructive notice of facts to a knowledge of which he would have been led by an inquiry into the matters affecting the property, of which he had actual notice; and, secondly, those where the court has been satisfied that the party charged had designedly abstained from inquiry for the purpose of avoiding notice. If there is not actual notice that

the property is in some way affected so that the case does not fall within the first class, and no fraudulent turning away from a knowledge of facts which the res gestæ would suggest to a prudent mind, or gross and culpable negligence, so as to bring it within the second, then the doctrine of constructive notice would not apply."

The Supreme Court then adds:

"Each case must be governed by its own peculiar circumstances."

Simmons Creek Coal Co. v. Doran, 142 U. S., 417.

Applying these statements of the law to the facts of the present case, we think the trial court was right in holding that the
70 Lukes were put upon inquiry and by diligence could have ascertained before the sale the rights of Smith in the premises. The complaint advised them that Smith and Rainey had a contract in writing, which Smith claimed gave him a lien upon the land. While this pleading was technically deficient, it disclosed enough to cause a prudent man to inquire as to the full terms of this writing, before purchasing. It is suggested by the appellee that, as defendants in the action, the Lukes could, by application to the court under Paragraph 2555 of our statutes, have obtained a copy of the contract; but it is probable that had they requested of Smith or his counsel out of court a disclosure of the full terms of the contract, they would be protected. They made no inquiry, and we think that in failing to do so they were at fault and must be held chargeable with the knowledge they would have obtained had they made inquiry.

In 1898 Rainey executed a mortgage to one Hubbard upon the one-third undivided interest in the land standing in his name, warranting that his title thereto was free and unincumbered, which said mortgage was placed of record. Appellants contend that by participating and acquiescing in the placing of such title in Rainey of record, and with notice and without protest permitting Rainey to mortgage the property, and otherwise publicly treat it as his
71 own individual property, Smith waived all right to claim a lien upon said premises prior and superior to that of the attachment and judgment creditors of Rainey. There is no evidence, however, that Smith knew anything of this mortgage, and we do not think that the record operated as constructive notice to him.

Bates v. Norcross, 14 Pick., 224.
Maul v. Rider, 59 Pa. St., 167.
Building Ass'n v. Fellers, 96 Va., 337; 31 S. E., 505.
White v. McGregor, 92 Tex., 556; 50 S. W., 564.

It is further insisted that by reason of the failure to comply with the requirements of Paragraph 2703, R. S. 1901, the property standing in Rainey's name is to be treated, in favor of his creditors, as his property. We do not think the statute applicable. It relates to merchants and traders, and not to a joint venture in the purchase and improvement of real estate, such as the record discloses existed in this case.

We perceive no error in the record, and affirm the judgment of the district court.

JOHN H. CAMPBELL, *A. J.*

We concur:

FLETCHER M. DOAN, *A. J.*
ERNEST W. LEWIS, *A. J.*
EDWARD M. DOE, *A. J.*

72 And on the same day to-wit: the 2nd day of April, 1910, being one of the regular juridical days of the January term of said court, 1910, the following order and judgment, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

No. 1123.

FRANK LUKE and JOHN LUKE, Appellants,
vs.
JESSE HOYT SMITH, Appellee.

This cause having been heretofore submitted and by the Court taken under advisement, and the Court having considered the same and being fully advised in the premises:

It is ordered that the judgment of the District Court be, and the same is hereby, affirmed.

It is further ordered, adjudged and decreed that the appellee herein do have and recover of and from Frank Luke and John Luke appellants herein, and P. T. Hurley, J. W. Walker, Edward Eisele and Joseph Thalheimer sureties on Supersedeas Bond herein, all damages which he may sustain by the staying of the sale of the property pending this appeal, and

It is further ordered, adjudged and decreed that the appellee herein do have and recover of and from Frank Luke and John Luke, appellants herein, and D. C. Babbitt and Wm. E. Thomas,
73 sureties on Cost Bond herein, his costs in this court, taxed at forty-one ($41.00) dollars, together with his costs in the court below in this cause incurred.

And on to-wit: the 15th day of April, 1910, came the appellants by their attorneys, and filed in the clerk's office of said court in said entitled cause their certain Motion for Rehearing, in words and figures following, to-wit:

In the Supreme Court of the Territory of Arizona.

JESSE HOYT SMITH, Plaintiff and Appellee,
vs.
WILLIAM J. RAINEY and LILLIAN RAINEY, Defendants; FRANK LUKE and JOHN LUKE, Defendants and Appellants.

Motion for Re-hearing.

Comes now the defendants and appellants Frank Luke and John Luke, and move the court to grant the said appellants a re-hearing of said cause on the following grounds:

I.

The court failed to take note of the fact disclosed by the record and found by the trial court that the lien which the plaintiff
74 Smith is attempting to foreclose in this case was created by an instrument in writing, which, though unacknowledged, is entitled to be recorded under the decisions of this court.
95 Pac. 180.

It surely will not be contended that under the terms of the case above cited, the Recorder could refuse to record the contract in writing between Smith and Rainey. It was an instrument in writing creating a lien and therefore a mortgage. It is so characterized by plaintiff in each of his complaints. He relies upon it as a mortgage and asks its foreclosure. It was capable of record and is clearly within the terms "all deeds of trust and mortgages whatsoever" of Par. 749 R. S., and just as clearly within the terms of the construction of that section by the Supreme Court of Texas in the case of Senter vs. Lambeth, 59 Tex. 259 wherein they say that the equitable liens excluded from the operation of that section are only those "not susceptible of Registration" and that all rights and interests "represented by some written instrument that is required or permitted to be recorded and which he has neglected to record" are within the terms of the Statute and void as to all creditors.

II.

In determining the question of notice the court omitted to take note of the fact that the property in controversy was attached
75 June 11th, 1903, and that that attachment lien was foreclosed by judgment rendered June 11th, 1904, before even the first complaint in this case was filed, and that the right of all parties to this action were fixed and determined at that time and that under the decisions of the Supreme Court of the United States, neither notice or conveyance after that date can affect the purchaser at the sale under the judgment.
Hitz vs. Nat'l Met. Bank, 111 U. S. 722.

III.

The court refused to give effect to the provisions of Par. 2703 R. S. 1901 on the ground that that paragraph relates only to merchants and traders. The record discloses that the purchase by Smith and Rainey of the premises in question was a business venture. The purpose being, as disclosed by the contract, to subdivide the tract and sell it in lots and blocks, or other subdivisions. In other words, to buy the whole tract at wholesale and sell it at an advanced price at retail.

Even if the conclusion of the court be correct, the paragraph is applicable only to traders, we think the contract and the objects and purposes of the parties to it, as therein set forth, clearly places them in the category of traders.

The court in construing par. 749 follows the familiar rule that having adopted this section from Texas, this court will follow
76 the interpretation it believes the Supreme Court of that State had placed upon it before its adoption by the legislature of this Territory. We concede this to be the rule.

But the court has not applied the same rule in construing par. 2703 which was adopted by this Territory from the Statutes of Mississippi after the Supreme Court of that State had construed it in the case of Gumbel vs. Koon, 59 Miss. 265, in which the court says:

"The object of the statute was to prevent the assertion of secret claims to property as against creditors of the person who seems to be the owner of it, evidenced by his dealings with it, and it conclusively fixes the ownership to be in the person whose sign is exhibited at the place where the business is conducted or who, in the absence of any sign, is the manager of the business".

We think that in adopting this statute this Territory adopted the construction placed upon it by the State of Mississippi and that the same rule should be applied to the Statute of Mississippi as that of Texas.

IV.

We desire to call the attention of the court to one other point only. And we do so for the first time now, because it was for the first time suggested to the court in oral argument by the appellee, and we think it may have influenced, if not controlled the opinion of the court.

The court will note, that the plaintiff has declared on the
77 written instrument, and in his pleading has characterized it as creating a mortgage lien which he asks to have foreclosed. But to evade the provisions of par. 749 regarding the recording of mortgages, counsel suggests that the plaintiff's lien is not dependent upon the written instrument, but exists as a partner's lien independent of the writing. And this, notwithstanding that the Supreme Court of the United States has declared that "taking the instrument as a whole, we are of opinion that it (the instrument) gives the appellant a lien. Whether the defendants nevertheless may not be entitled to priority, is not before us now".

Smith vs. Rainey, 200 U. S. 56.

Now if the lien exists by virtue of the writing only, it is a mortgage lien and may be foreclosed. But if the lien now claimed by Smith exists independent of the writing, then it must be simply the partner's equitable lien. This equitable lien is not a specific lien of one partner upon that portion of the partnership assets standing in the name of one of the other partners, but is a general lien upon all the assets of the partnership. It is in fact only a right to have all the partnership assets applied to the payment of the partnership debts, among which may be a debt due to one of the partners. The partner's lien cannot be enforced against one of the individual partners, but can only be availed of by a dissolution of the part-
78 nership, an accounting between the partners, and the sale of all the partnership assets.

We call attention to this matter only for the purpose of showing that the plaintiff Smith has pursued his remedy in this case on the theory that the lien he claims is not the equitable lien upon all the partnership assets growing out of the partnership relation, but a specific lien upon a particular item of alleged partnership property standing in the name of the individual partner. Therefore the lien for which the plaintiff has sought and obtained a decree of foreclosure, is a specific lien on specific property, created by an instrument in writing permitted and required to be recorded, and which the plaintiff has neglected to record, and is directly within the terms of the Texas decisions of the Supreme Court of Texas construing Sec. 749 of our Revised Statutes of 1910.

In this connection, too, we respectfully suggest that the decision in this case does not seem to be in accord with former holdings of this court.

In the case of Baker vs. Fleming this court had under consideration the question whether the doctrine of vendors' lien should obtain in this Territory. Or as stated by the court, "whether a grantor of real estate by absolute conveyance has an implied equitable lien thereon for the unpaid purchase money. If such a lien arises
79 at all, it must, on principle prevail alike against the grantee himself and all subsequent purchasers with notice."

In denying the existence of such lien this court quotes with approval the following language used by Chief Justice Marshall in Bailey vs. Greenleaf, 7 Wheat. 46:

"It is a secret, invisible trust, known only to the vendor and vendee, and to whose whom it may be communicated in fact. To the world, the vendee appears to hold the estate devested of any trust whatever, and credit is given to him in the confidence that the property is his own in equity as well as law. A vendor, relying upon this lien, ought to reduce it to a mortgage, so as to give notice of it to the world. If he does not, he is in some degree accessory to the fraud committed on the public, by an act which exhibits the vendee as the complete owner of an estate on which he claims a secret lien".

And again this court quotes with approval the following language by Judge Gray (afterwards of the United States Supreme Court) in a Massachusetts case in which the question of secret (vendor) liens was under consideration:

"If no third person has acquired any rights in the land by bona fide attachment or conveyance, the original vendor may secure payment of the debt due him for the purchase money by the usual attachment or mesne process. If any third person has acquired rights in the property, there is no reason why equity, any more than the common law should interpose to defeat them".

And in expressing its opinion in the case cited this court says:

"After giving to the question the deliberate consideration
80 which its importance demands, we are forced to the conclusion that this principle of an implied lien for purchase money can have no just application in this Territory. It is opposed to the policy of our legislation, which aims to make the title to real estate as simple and easily understood as possible, and to facilitate its transfer and improvement by discouraging all secret or latent equities, and requiring conveyances and encumbrances thereof to be made matters of public record. Here, our attachment law readily permits a debt to become a lien before judgment, and debts generally are a lien upon the lands of decedents. The doctrine being thus repugnant to our registration law, ill-suited to our condition, and by no means essential to the interests of justice, we ought not to adopt it."

Baker vs. Fleming, 6 Ariz. 418.

It seems to us that the decision of the court in the case at bar is incompatible with the principle announced in the Baker case. That the doctrine of secret liens therein denounced and repudiated as being inconsistent with that simplicity and openness of land titles which shall facilitate its transfer and improvement and its use as security which it heretofore has been the policy of our laws to foster and encourage is, by the decision in this case, established in our jurisprudence and the principle of the decision of the Baker case is disapproved.

If the decision in this case is adhered to, the record title to real estate in this Territory and the abstracts thereof upon the faith and credit of which vast amounts of capital are invested in the form of loans and transfer, can no longer be regarded as showing the
81 true state of *of* the title, upon which investors may safely rely.

We trust the court will again, upon this motion, carefully examine the basis of the decision in this case before finally establishing in our jurisprudence a principle, the consequences of which will be so far reaching, and as we believe disastrous.

Respectfully submitted,

KIBBEY, BENNETT & BENNETT,
Attorneys for Appellants.

And on to-wit: the 20th day of May, 1910, being one of the regular juridical days of the January term of said court, 1910, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

At this day, it is ordered by the Court that the Motion for Rehearing filed herein by appellants, be submitted.

And on to-wit: the 21st day of May, 1910, being one of the regular juridical days of the January term of said court, 1910, the following order, inter alia, was had and entered of record in said cause,
87 in words and figures following, to-wit:

Title of Cause.

At this day it is ordered by the Court that the Motion for Rehearing filed herein by appellants, and heretofore submitted, be, and the same is hereby denied.

And on the same day to-wit: the 21st day of May, 1910, being one of the regular juridical days of the January term of said court, 1910, the following other order was had and entered of record in said cause in words and figures following, to-wit:

Title of Cause.

At this day comes Mr. Jos. H. Kibbey for appellants herein, in open court, and gives notice of appeal to the Supreme Court of the United States from the judgment of this court, and

Upon motion of Mr. Jos. H. Kibbey, it is ordered that the appeal be, and the same is hereby allowed, and the amount of the Supersedeas Bond be fixed in the sum of Ten Thousand ($10,000.) Dollars and the Appeal Bond fixed in the sum of One Thousand ($1,000.) Dollars.

And on to-wit: the 23rd day of June, 1910, came the appel-
88 lants by their attorneys, and filed in the clerk's office of said court in said entitled cause a certain order allowing appeal and fixing Supersedeas Bond, in words and figures following, to-wit:

In the Supreme Court of the Territory of Arizona.

JESSE HOYT SMITH, Plaintiff and Appellee,
vs.
WILLIAM J. RAINEY and LILLIAN RAINEY, Defendants; FRANK LUKE and JOHN LUKE, Defendants and Appellants.

Before the Honorable John H. Campbell, Associate Justice of the Supreme Court of the Territory of Arizona.

The above named Frank Luke and John Luke having prayed an appeal to the Supreme Court of the United States from the decision, order and judgment of the Supreme Court of the Territory of Arizona rendered in the above entitled cause on the 2nd day of April, 1910, whereby the said Supreme Court affirmed the order, judgment

and decree of the District Court of the Third Judicial District of the Territory of Arizona, in and for the County of Maricopa in said cause entered in said District Court on the 27th day of March, 1909, whereby it was, among other things, ordered, adjudged and decreed
84 that the judgment recovered by said Jesse Hoyt Smith in said action against the defendant William J. Rainey, for the sum of Twenty-eight Thousand Two Hundred Twenty-four and 2/100 ($28,224.02) Dollars, with interest and costs of suit, should be a superior and prior lien on the undivided one-third interest in and to the property described in the complaint in said action heretofore owned by said William J. Rainey, and the legal title to which is now held by the defendants and appellants Frank Luke and John Luke, and that the said lien be foreclosed and that the said premises be sold as under execution in satisfaction of said judgment; and the said Frank Luke and John Luke having prayed for a supersedeas suspending the operation of said judgment pending said appeal; it is ordered that the said appeal be, and the same hereby is allowed.

And it is further ordered that the operation of said judgment in so far as it directs that the property of the said appellants Frank Luke and John Luke be seized and sold in satisfaction of said judgment, be suspended pending the determination of this appeal by the Supreme Court of the United States upon the said appellants, Frank Luke and John Luke, executing an appeal bond in this cause in the sum of Ten Thousand ($10,000) Dollars, conditioned that the said appellants shall prosecute their said appeal to effect, and shall answer
85 all costs and damages, if they shall fail to make their plea good, and shall pay to the said Jesse Hoyt Smith all damages which he shall sustain by reason of the granting of such supersedeas and the staying of the sale of said premises under such judgment and order of sale in satisfaction of said judgment pending this appeal, and all costs which shall be adjudged against him on such appeal.

Done at Phoenix, the Capital, this 15th day of June, 1910.

JOHN H. CAMPBELL,
Associate Justice of the Supreme Court of the Territory of Arizona.

And on the same day, to-wit: the 23rd day of June, 1910, came the appellants by their attorneys, and filed in the clerk's office of said court in said entitled cause their certain Assignment of Errors in words and figures following, to-wit:

86 In the Supreme Court of the Territory of Arizona.

JESSE HOYT SMITH, Plaintiff and Appellee,

vs.

WM. J. RAINEY et al., Defendants; FRANK LUKE and JOHN LUKE, Defendants and Appellants.

Assignment of Errors.

I.

The Supreme Court of the Territory of Arizona erred in offering the judgment of the trial court in said cause.

II.

The Court erred in holding that by virtue of the partnership created by the contract between Smith and Rainey, Rainey became a trustee for Smith of the undivided one-third of the premises in controversy, and that by virtue thereof Smith has a lien thereon for the amount found due him from Rainey.

III.

The court erred in holding that the original unverified complaint filed in this case gave to Frank Luke and John Luke constructive notice of the existence of a partnership between Smith and Rainey and all the equities arising therefrom.

87 IV.

The Court erred in holding that the unrecorded contract between Smith and Rainey is not within the provisions of paragraph 749 of the Revised Statutes of Arizona of 1901 and void as to all creditors of Rainey.

V.

The court erred in holding that if the Lukes had notice, actual or constructive, of the terms of the written, but unrecorded contract between Smith and Rainey, prior to their purchase of the premises at their execution sale, they took the title thereto subject to all the equities between Smith and Rainey arising, though they had no notice, actual or constructive, of the existence of such contract or any equities arising thereunder at the time of the levy of their attachment or the rendition of the judgment and attachment of the judgment lien under which the property was sold.

VI.

The Court erred in holding that paragraph 2703, Revised Statutes of Arizona 1901 relates only to merchants and traders and is not applicable to the facts in this case.

VII.

The Court erred in holding that the contract sued on in this case gives Smith a lien upon Rainey's undivided one-third interest
88 in the premises in controversy, and that said lien is prior and superior to the title thereto acquired by the Lukes at their execution sale.

VIII.

The Court erred in affirming the decree of the lower court foreclosing an alleged mortgage lien in favor of the plaintiff Smith upon the undivided one-third interest standing of record in the name of Rainey, and declaring said lien to be prior and superior to the title to said undivided one-third interest acquired by the Lukes at their execution sale.

KIBBEY, BENNETT & BENNETT,
Attorneys for Appellants Frank Luke and John Luke.

And on the same day, to-wit: the 23rd day of June, 1910, came the appellants by their attorneys, and filed in the clerk's office of said court in said entitled cause their certain Supersedeas Bond in words and figures following, to-wit:

89 In the Supreme Court of the Territory of Arizona.

JESSE HOYT SMITH, Plaintiff and Appellee,
vs.
WILLIAM J. RAINEY et al., Defendants; FRANK LUKE and JOHN LUKE, Defendants and Appellants.

Know all men by these presents That we, Frank Luke and John Luke, as principals, and W. T. Smith and J. W. Walker, as sureties, are held and firmly bound unto Jesse Hoyt Smith in the penal sum of Ten Thousand ($10,000.00) Dollars lawful money of the United States, for which sum well and truly to be paid unto the said Jesse Hoyt Smith, we bind ourselves, our heirs, executors, administrators and assigns jointly, severally and firmly by these presents.

Sealed with our seals and dated this 15th day of June, 1910.

The conditions of this obligation are such that,

Whereas, on the 27th day of March, 1909, the said Jesse Hoyt Smith, in a certain cause then pending in the District Court of the Third Judicial District of the Territory of Arizona, in and for the County of Maricopa, wherein said Jesse Hoyt Smith was plaintiff and William J. Rainey, Lillian Rainey, Frank Luke and
90 John Luke were defendants, did recover a judgment against said William J. Rainey for the sum of Twenty-eight Thousand Two Hundred Twenty-four 02/100 Dollars ($28,224.02) with interest thereon at the rate of six per cent per annum, together with the costs of said action taxed at Thirty-three and 90/100 Dollars, and which said judgment is thereby declared to be a prior and superior lien upon the undivided one-third interest in and to the following described premises, viz:

Section Twenty-two (22), Township Two (2) North, Range Three East of the Gila and Salt River base and meridian (excepting therefrom the northwest quarter (¼) of the northwest quarter (¼) of said section). Together with seven and one-half (7½) water rights in the Arizona Canal numbering from one hundred and one (101) to one hundred and eight (108) inclusive, deeded and affixed to said premises, the legal title to which is held by the said Frank Luke and John Luke, and which said judgment directs that an order of sale issue out of said Court to the Sheriff or any Constable of said Maricopa County, directing him to seize and sell said premises as under execution in satisfaction of said judgment, and

Whereas, upon appeal of said cause to the Supreme Court of the Territory of Arizona, the said Supreme Court of the Territory of Arizona did affirm said judgment, and

91 Whereas, the said Frank Luke and John Luke have prayed an appeal from the judgment of the Supreme Court of the Territory of Arizona affirming the said judgment of the District Court of the Third Judicial District of the Territory of Arizona, and a supersedeas staying the sale of said premises in satisfaction of such judgment pending such appeal to the Supreme Court of the United States, which appeal and supersedeas have been duly allowed by Hon. John H. Campbell, Associate Justice of the Supreme Court of the Territory of Arizona, upon the execution by the said Frank Luke and John Luke of good and sufficient bond to the said Jesse Hoyt Smith in the penal sum of Ten Thousand ($10,000.00) Dollars, conditioned as in said order allowing said appeal provided.

Now, therefore, if the said Frank Luke and John Luke shall prosecute their said appeal to effect and shall answer all damages and costs if they shall fail to make their plea good, and shall pay to the said Jesse Hoyt Smith all damages which he shall sustain by reason of the granting of such supersedeas and the staying of the sale of said premises under such judgment and order of sale in satisfaction of said judgment pending said appeal, and all costs which shall be adjudged against them on such appeal, then this obligation to be void; otherwise to remain in full force and virtue.

FRANK LUKE.
JOHN LUKE.
J. W. WALKER.
W. T. SMITH.

92 TERRITORY OF ARIZONA,
County of Maricopa, ss:

Before me, Ethel Whitlow, a Notary Public in and for said County in said Territory, personally came, this 15th day of June, 1910, W. T. Smith and J. W. Walker sureties on the foregoing appeal bond, and being duly sworn, each for himself and not one for the other, says that he is worth Ten Thousand ($10,000.00) Dollars over and above his just debts and liabilities, exclusive of property exempt from execution.

W. T. SMITH.
J. W. WALKER.

Subscribed and sworn to before me by each of said affiants, severally, this 15th day of June, 1910.

Witness my hand and official seal.

[SEAL.] ETHEL WHITLOW,
Notary Public.

My commission expires February 6, 1913.

Approved:
JOHN H. CAMPBELL,
Associate Justice.

93 And on the same day to-wit: the 23rd day of June, 1910, there was filed in the clerk's office of said court in said entitled cause a certain Statement of Facts in words and figures following, to-wit:

In the Supreme Court of the Territory of Arizona.

JESSE HOYT SMITH, Plaintiff and Appellee,
vs.
WM. J. RAINEY et al., Defendants; FRANK LUKE and JOHN LUKE, Defendants and Appellants.

The defendants, Frank Luke and John Luke, having prayed an appeal from the judgment and decision of this Court heretofore during the January Term, 1910, thereof rendered and made in this cause, and said appeal having been allowed, and said defendant having also prayed that this court make and certify a finding and statement of facts in this cause to be transmitted and used on said appeal, this court does hereby make and certify the following statement of facts herein, being the facts found by the trial Court, viz:

1.

That on March 20th, 1897, the plaintiff Jesse Hoyt Smith, and the defendant William J. Rainey, purchased from the Ari-
94 zona Land and Stock Company, a corporation, the premises described in the plaintiff's complaint for the sum of eighteen thousand ($18,000) dollars; that the total purchase price of said premises was the said sum of eighteen thousand dollars, all of which said sum was advanced and paid over to said Arizona Land and Stock Company by said Jesse Hoyt Smith on March 20th, 1897, and thereupon the said Arizona Land and Stock Company executed, acknowledged and delivered to said Smith and Rainey a warranty deed to said premises, conveying an undivided two-thirds interest therein to said Smith and an undivided one-third interest therein to said Rainey; the granting clause in which deed is in the words and figures following, to-wit:

"Have granted, sold and conveyed, and by these presents do sell, grant and convey unto the said Jesse Hoyt Smith, an undivided two-thirds (⅔) interest, and unto the said William J. Rainey an undi-

vided one-third (⅓) interest, of, in and to all those certain premises situated in Maricopa County, Arizona Territory, as follows, to-wit

Section twenty-two (22), Township Two (2) North, Range Three East of the Gila and Salt River Base and Meridian (excepting therefrom the northwest quarter (¼) of the northwest quarter (¼) of said Section). Together with seven and one-half (7½) water rights in the Arizona Canal, numbering from one hundred and one (101) to one hundred and eight (108) inclusive, deeded and affixed to said premises."

And that on said 20th day of March, 1897, the said deed was duly recorded in the Recorder's Office of said Maricopa County, Arizona.

2.

That during the latter part of April, 1897, namely, on or
95 about April 29th, 1897, the said William J. Rainey and Jesse Hoyt Smith executed the contract in writing bearing date March 20th, 1897, a copy of which is attached to the second amended complaint in this cause, and is in the words and figures following, to-wit:

"This Memorandum of Agreement, Made this 20th day of March, 1897, by and between Jesse Hoyt Smith, of Milwaukee, Wisconsin, and William J. Rainey, of Cleveland, Ohio, parties hereto,

Witnesseth: that whereas the said parties have this day purchased a certain tract of land known as Section 22 Township 2, North, Range 3 East of G. and S. R. Meridian, Maricopa County, Arizona, except the N. W. ¼ of the N. W. ½ of said Section, for the sum of Eighteen Thousand Dollars ($18000) in cash, said tract of land having been purchased by the said parties in the proportion of an undivided two-thirds (⅔) interest to the said Jesse Hoyt Smith and an undivided one-third (⅓) interest to the said William J. Rainey according to a deed now on record in the office of the County Recorder of Maricopa County, Arizona, in book 43 of Deeds, pages 565-6-7;

And Whereas the said tract of land was so conveyed free and clear of all liens and incumbrances, and the full consideration for the whole thereof, being Eighteen Thousand Dollars ($18,000) was paid in cash Jesse Hoyt Smith and said William J. Rainey has agreed to repay to said Jesse Hoyt Smith the one-third (⅓) thereof with interest thereon at six per cent per annum as hereinafter provided.

And Whereas said parties have joined in said purchase for the purpose of platting, grading and otherwise improving said property, and so improved selling and disposing of the same at a profit.

Now therefore, the parties hereto do, and each for himself doth, agree with the other in the manner following;

First. That the improvement of said tract of land shall be commenced not later than the 1st day of January, 1898, and such improvements be thereafter continued with reasonable diligence and dispatch until the same shall be in marketable condition as lots

96 Second. That the improvements aforesaid shall consist of the surveying and platting the entire tract into lots, the opening up and grading of all the streets; the planting of suitable shade, ornamental and fruit trees, and the making of all such other improvements as may be hereafter agreed upon between the parties hereto.

Third. That said Jesse Hoyt Smith, in addition to the sum of Eighteen Thousand Dollars ($18,000) so advanced by him as aforesaid, shall also from time to time make all necessary advances of money for the improvements aforesaid, and also all such as shall be required for the running and incidental expenses of the undertaking, including taxes, irrigation charges, marketing said lots and the reasonable and necessary expenses of said William J. Rainey from Cleveland, Ohio, to Phœnix, Arizona, and return, and his living expenses when in Arizona while engaged in business relating to said property.

Fourth. That all money advanced by said Jesse Hoyt Smith in said purchase, as well as all such as shall be hereafter advanced by him for any of the purposes aforesaid, shall be considered and treated as a loan or loans by him, and shall be paid to him as rapidly as possible from the receipts from the sale or sales or other income of said property until the same shall be fully paid, with interest at six per cent per annum, and before any division of profits shall be made or paid.

Fifth. That if at the date of five (5) years from the date hereof, all the loans aforesaid shall not have been fully paid to said Jesse Hoyt Smith, with interest as above provided, then and in that event said William J. Rainey hereby agrees that he will on demand thereafter pay to said Jesse Hoyt Smith the one-third (⅓) of all such loans then unpaid, including interest thereon as aforesaid.

Sixth. That said William J. Rainey shall have general management of said tract of land, including the improvements thereof as aforesaid, and the employment of all labor and making of all contracts necessary therefor, and also including the handling and sale of said lots when so improved; provided, however, that no contracts or other obligation on account of said property exceeding in the aggregate the sum of Five Thousand Dollars ($5000.00) shall be entered into without the previous written consent of said Jesse Hoyt Smith, and no contract for the sale of any such lots shall be made except at prices and on terms to be agreed upon between the parties hereto; provided always that said William J. Rainey shall at
97 all times and from time to time give to said Jesse Hoyt Smith true accounts of all transactions relating to the business, and full information in regard to all matters which shall come to his hands or knowledge respecting such business, and shall give due regard to his wishes and directions respecting the same.

Seventh. That said William J. Rainey shall keep full, true, correct and proper books of account of all the transactions and dealings relating to said business, which shall at all times be open to the inspection of said Jesse Hoyt Smith; and that he will on the 10th day of each month render to said Jesse Hoyt Smith an account in full

of all transactions during the preceding month, including all contracts made and all disbursements and receipts, and showing all the assets and liabilities of the partnership.

Eighth. That said William J. Rainey hereby agrees to accept the said general management of said tract of land, without other consideration or remuneration excepting only his one-third (⅓) share in the net profits of such business as is hereinafter provided.

Ninth. That after the repayment to said Jesse Hoyt Smith of the said sum of Eighteen Thousand Dollars ($18,000) so advanced by him for the purchase of said tract and the repayment of all advances which shall be hereafter made by him on account of said property or said business, together with interest on all such sums at six (6) per cent per annum, the net profits of said land and business shall be divided between the parties hereto as follows: Said Jesse Hoyt Smith shall be entitled to the two-thirds (⅔) thereof, and said William J. Rainey the one-third (⅓) thereof; and the losses, if any, shall be shared between the parties in ratio aforesaid.

It is further agreed and understood between the parties hereto that this Memorandum of Agreement is made for the purpose of stating explicitly the terms of copartnership on which the said Jesse Hoyt Smith and William J. Rainey have joined in the purchase, improvement and sale of said tract or lots, and that each will fulfill in good faith and to the best of his ability the articles herein contained. Which covenants and agreements shall extend to and bind the respective parties and their respective legal representatives.

In witness whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

J. HOYT SMITH. [SEAL.]
WM. J. RAINEY. [SEAL.]

98 In presence of
J. W. DADMUN.
Z. M. CHANDLER."

8.

That on the 28th day of November, 1898, the said William J. Rainey executed and delivered to one Anthony G. Hubbard a mortgage upon an undivided one-third interest in said premises to secure the payment of a promissory note of said Rainey to said Hubbard for the sum of $3000, of even date therewith, due November 28th, 1901, with interest thereon at the rate of 8½% per annum, which said mortgage contained the following clause, namely: "And the said William J. Rainey hereby covenants that he is well and truly seized of a good and perfect title to the premises above conveyed, in law, in fee simple, and has good right and lawful authority to convey the same to the party of the second part, his heirs and assigns, and that the title so conveyed is clear, free and unencumbered, and that he will warrant and defend the same forever to the party of the second part, his heirs and assigns against all claims whatsoever."

That said mortgage was duly acknowledged and was on December 6th, 1898, recorded in the office of the County Recorder of Maricopa

County, Arizona, and was thereafter on the 4th day of October, 1901, released and discharged of record by the mortgagee Anthony G. Hubbard.

4.

99 That at various times between March 20th, 1897, and May 23, 1903, the said Jesse Hoyt Smith, under the terms of the aforesaid contract, advanced the further sum of $32,473.35, and that one-third part of such payments and advances so made by the said Jesse Hoyt Smith, together with interest from the date of such several payments and advances, at the rate of 6 per cent per annum, amounts to the sum of $21,772.17, which said sum was due to said Jesse Hoyt Smith from the said William J. Rainey under the terms of said contract, on May 23, 1903.

That since the 23rd day of May, 1903, and prior to the 28th day of November, 1903, the said Jesse Hoyt Smith advanced the further sum of $1085, one-third part thereof, together with interest thereon from said 28th day of November, 1903, was on the trial of this action due from the said William J. Rainey to the said Jesse Hoyt Smith; and that the total amount due at the date hereof, from the said William J. Rainey to the said Jesse Hoyt Smith, for principal and interest for such advances, under the terms of said contract, is the sum of Twenty-eight Thousand Two Hundred and Twenty-four and 02/100 Dollars. That no part thereof has been paid to the said plaintiff Jesse Hoyt Smith.

5.

That the said Jesse Hoyt Smith has complied with and fulfilled all of the terms and conditions of said contract on his part to
100 be performed, and that the said William J. Rainey has failed and neglected to perform and carry out the terms and conditions of the said contract on his part to be performed and carried out.

6.

That on June 11th, 1902, the record title to an undivided one-third interest in and to Section twenty-two, Township Two North of Range Three East of the Gila and Salt River Base and Meridian, in Maricopa County, Arizona (except the northwest quarter of the northwest quarter of said section), was in said William J. Rainey by virtue of the deed from the Arizona Land and Stock Company to said Jesse Hoyt Smith and William J. Rainey above mentioned, and that on said last mentioned date the said defendants John Luke and Frank Luke commenced an action in the District Court of Maricopa County, Arizona, against the said William J. Rainey to recover the sum of twenty-five hundred (2500) dollars, with interest thereon from April 1st, 1902, and that in said action the plaintiffs therein sued out of this Court a writ of attachment for the said sum of $2500 and interest as aforesaid against the property of the said William J. Rainey to secure the said sum of $2500 and interest aforesaid and caused the same to be delivered to the Sheriff of Maricopa County, Arizona, for service. That on the said 11th

day of June, 1902, the said Sheriff of Maricopa County, by virtue of the said writ of attachment, duly seized and levied the
101 said writ of attachment upon, and attached all the right, title and interest of the said William J. Rainey in and to the above described premises, and on said day filed a copy of said writ of attachment, together with a description of the property attached, with the County Recorder of Maricopa County, and the same was on said day duly filed by him and recorded in said Recorder's office in a book kept by him for that purpose.

That thereafter such proceedings were had in said cause that on the 11th day of June, 1903, the said Frank Luke and John Luke recovered a judgment against the said William J. Rainey for the sum of $2,500.00 with interest thereon at the rate of 6 per cent per annum from April 1st, 1902, together with the costs of said action, and which judgment foreclosed the lien of said attachment upon the premises hereinbefore described as the same existed on June 11th, 1902, and ordered and directed that same be sold as under execution to satisfy said judgment.

That on the 6th day of August, 1903, an order of sale was duly issued out of said Court in said cause directed to the Sheriff of Maricopa County, Arizona, commanding him to seize and sell as under execution the premises and property hereinbefore mentioned to satisfy said judgment, and that by virtue thereof, the said Sheriff did seize the said premises and property, and pursuant to a notice duly published and posted as required by law, did, on the
102 8th day of September, 1903, sell the said premises and property at public auction to the highest and best bidder, and that the defendants Frank Luke and John Luke were the purchasers at said sale, and did purchase the said premises at said sale for the sum of twenty-nine hundred dollars and seventy-six cents ($2,900.76), the said amount being the full amount of said judgment and costs, and that thereupon the said Sheriff executed and delivered to said defendants Frank Luke and John Luke the usual certificate of purchase of said premises, and that thereafter on the 29th day of December, 1903, the said Sheriff returned the said execution and order of sale unto the office of the Clerk of this Court, showing the said judgment and said execution and order of sale to be fully satisfied and discharged by the sale of said premises. That thereafter on the 20th day of June, 1904, no redemption of said premises from said sale had been made, and that on the said last mentioned date the Sheriff of Maricopa County, Arizona, executed, acknowledged and delivered — the said Frank Luke and John Luke a Sheriff's Deed to said premises.

7.

That the said contract attached to the said second amended complaint, as Exhibit A thereof, has never been filed for record in the Recorder's office of Maricopa County, Arizona, and that the said defendants Frank Luke and John Luke had not nor had
103 either of them any knowledge or notice of the existence of said contract at any time prior to the filing of the plaintiff's second amended complaint herein, to which a copy of said contract

is attached as Exhibit A, on December 31, 1903, saving and excepting such notice actual or constructive as was imparted to them by the pleadings in this cause, or which the law imputed to them from such pleadings.

JOHN H. CAMPBELL,
Associate Justice of the Supreme Court of the Territory of Arizona.

And on to-wit: the 28th day of June, 1910, there was filed in the clerk's office of said court in said entitled cause a certain Bond on Appeal in words and figures following, to-wit:

104 In the Supreme Court of the Territory of Arizona.

JESSE HOYT SMITH, Plaintiff and Appellee,
vs.
WILLIAM J. RAINEY and LILLIAN RAINEY, Defendants; FRANK LUKE and JOHN LUKE, Defendants and Appellants.

Know all men by these presents that we, Frank Luke and John Luke, as principals, and D. C. Babbitt and Wm. E. Thomas, as sureties, are held and firmly bound unto Jesse Hoyt Smith in the penal sum of One Thousand ($1,000) Dollars lawful money of the United States, for which sum well and truly to be paid unto the said Jesse Hoyt Smith, we bind ourselves, our heirs, administrators and assigns jointly, severally and firmly by these presents.

Sealed with our seals and dated this 22nd day of June, 1910.

The condition of the above obligation is such that,

Whereas, the above named appellants Frank Luke and John Luke have appealed to the Supreme Court of the United States from the final judgment rendered by the above named Court in the above entitled action, and the said appellants have obtained an allowance of their appeal to the Supreme Court of the United States.

105 Now therefore the condition of the above obligation is such that, if the said Frank Luke and John Luke, the above named appellants, shall prosecute their said appeal to effect and shall answer all damages and costs that may be awarded against them if they fail to make their plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

FRANK LUKE.
JOHN LUKE.
D. C. BABBITT.
WM. E. THOMAS.

TERRITORY OF ARIZONA,
County of Maricopa, ss:

Before me, J. C. Phillips, a Notary Public in and for said County, in said Territory, personally appeared, this 27th day of June, 1910, D. C. Babbitt and Wm. E. Thomas, the sureties on the foregoing appeal bond, and being duly sworn, each for himself and not one for the other, says that he is a freeholder within the Territory of Ari-

zona and is worth the sum of One Thousand ($1,000) over and above all his just debts and liabilities in unincumbered property in the Territory of Arizona, exclusive of property exempt from execution.

D. C. BABBITT.
WM. E. THOMAS.

Subscribed and sworn to before me by each of said affiants severally, this 27th day of June, 1910.

106 Witness my hand and official seal.

[SEAL.] J. C. PHILLIPS,
Notary Public.

My commission expires Jan. 17th, 1912.

Approved:
F. A. TRITLE, JR., *Clerk.* [SEAL.]

And on to-wit: the 29th day of June, 1910, there was filed in the clerk's office of said court in said entitled cause a certain Affidavit in words and figures following, to-wit:

107 In the Supreme Court of the Territory of Arizona.

JESSE HOYT SMITH, Plaintiff and Appellee,
vs.
WM. J. RAINEY et al., Defendants; FRANK LUKE and JOHN LUKE, Defendants and Appellants.

TERRITORY OF ARIZONA,
County of Maricopa, ss:

Frank Luke, being first duly sworn, on his oath says, that he is one of the defendants and appellants in the above entitled cause; that he is well acquainted with the premises and property known and described as Section twenty-two (22), Township Two (2) North, Range Three East of the Gila and Salt River Base and Meridian (excepting therefrom the northwest quarter (¼) of the northwest quarter (¼) of said section). Together with seven and one-half (7½) water rights in the Arizona Canal, numbering from one hundred and one (101) to one hundred and eight (108) inclusive, deeded and affixed to said premises, and that an undivided one-third interest in said premises exceeds in value the sum of Five Thousand ($5,000) Dollars; that the matter in dispute in this action, as between the said Jesse Hoyt Smith, plaintiff and appellee, and Frank Luke

108 and John Luke, defendants and appellants, is the right of the said Jesse Hoyt Smith to subject the undivided one-third interest in and to the above described premises to sale under execution upon the judgment recovered by said Jesse Hoyt Smith against the defendant William J. Rainey for the sum of Twenty-eight Thousand Two Hundred Twenty-four and 2/100 ($28,224.02) Dollars.

FRANK LUKE.

Subscribed and sworn to before me this 29th day of June, 1910.
[SEAL.] F. A. TRITLE, JR.,
Clerk Supreme Court.

109 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
State of Arizona, ss:

I, J. P. Dillon, Clerk of the Supreme Court of the State of Arizona, do hereby certify the above and foregoing to be a full, true and complete copy and Transcript of the Record, including the Abstract of Record, Opinion, Judgment, Motion for Re-hearing, Order allowing appeal and fixing bond, Assignment of Errors, Supersedeas Bond, Statement of Facts, Appeal Bond, Affidavit of Value, and all minute entries had and entered of record in a certain cause lately pending in said court, No. 1123, wherein Frank Luke and John Luke, were Appellants, and Jesse Hoyt Smith was Appellee, as the same remain on file and of record in my office, saving and excepting that part of said Abstract of Record containing the Reporter's Transcript of Evidence, Exhibits "C", "D", "E", Memorandum and Statement regarding other Exhibits omitted from the Abstract of Record, which have been omitted by direction of attorneys for Appellants as not necessary on the hearing of this appeal.

And I further certify that the same constitute the record in said cause.

And I further certify that the attached copy of Citation is a copy of the original Citation issued in said cause, the original Citation not now being among the files in this office.

And I further certify that the record shows that on August 19th, 1910, there was filed in this office in said cause an order Enlarging the time for filing the Transcript of Record in the Supreme Court of the United States.

In witness whereof, I have hereunto set my hand and the seal of said Court, this 10th day of December, A. D., 1912, at Phœnix, Arizona.

[Seal Supreme Court, State of Arizona.]

J. P. DILLON,
Clerk Supreme Court of Arizona.

110 In the Supreme Court of the Territory of Arizona.

JESSE HOYT SMITH, Plaintiff and Appellee,
vs.
WM. J. RAINEY et al., Defendants; FRANK LUKE and JOHN LUKE, Defendants and Appellees.

UNITED STATES OF AMERICA, *ss:*

To Jesse Hoyt Smith, Appellee:

You are hereby cited and admonished to be and appear at a Term of the Supreme Court of the United States to be holden at Washing-

ton, D. C., within sixty days from the date hereof, pursuant to an appeal filed in the Clerk's office of the Supreme Court of the Territory of Arizona, wherein Frank Luke and John Luke are appellants and Jesse Hoyt Smith is Respondent, to show cause, if any there be, why the judgment in said appeal mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 1st day of July, 1910.

JOHN H. CAMPBELL,
Associate Justice of the Supreme Court
of the Territory of Arizona.

We hereby waive the service of the above citation on us and consent that said citation with this waiver may be filed as complete service upon me and as my appearance on said appeal.

C. F. AINSWORTH,
Attorney of Record for Jesse Hoyt Smith.

[Endorsed:] No. 1123. In the Supreme Court of the Territory of Arizona. Jesse Hoyt Smith, Pl'ff & Appellee, vs. Wm. J. Rainey, et al., Defendants; Frank Luke and John Luke, Def'ts & Appellants. Citation. Filed July 12, 1910. F. A. Tritle, Jr., Clerk.

Endorsed on cover: File No. 22,357. Arizona Territory Supreme Court. Term No. 150. Frank Luke and John Luke, appellants, vs. Jesse Hoyt Smith. Filed October 17th, 1910. File No. 23,357.

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Supreme Court of the United States

OCTOBER TERM, 1912.

No. 150

JESSIE HOYT SMITH, *Plaintiff and Appellee,*

vs.

WILLIAM J. RAINEY, LILLIAN RAINEY and FRANK LUKE and JOHN LUKE, *Defendants,*
FRANK LUKE and JOHN LUKE, *Appellants.*

BRIEF FOR APPELLANTS.

1.

We think the court will get a better mental grasp of the facts in the case and their correlation by having before it a chronological statement of the events upon which the legal rights of the parties to this controversy are predicated.

March 20th, 1897.

Jesse Hoyt Smith and W. J. Rainey purchased from Arizona Land Stock Company 600 acres of land, and the warranty deed of said company conveying an undivided two-third interest therein to Jesse Hoyt Smith and an undivided one-third interest to W. J. Rainey, for an expressed consid-

eration of $30,000, was placed of record in the Recorder's office of Maricopa County, Arizona.

November 28th, 1898.

Rainey executed a mortgage to A. G. Hubbard of his undivided one-third interest in the land in controversy to secure $3,000. Mortgage recorded December 6th, 1898, in Recorder's office, Maricopa County. In this mortgage Rainey warrants:

> "That he is well and truly seized of a good and perfect title to premises above conveyed in fee simple, and has good right and lawful authority to convey the same to the party of the second part, his heirs and assigns, and that the title so conveyed is clear, free and unincumbered."

June 11th, 1902.

Action commenced by Frank and John Luke against Rainey upon a contract entered into September 1st, 1901, and an attachment sued out and levied on Rainey's undivided interest conveyed by the above deed, and writ and levy recorded in the Recorder's office. This action is No. 3958 of the District Court of Maricopa County, Arizona.

June 11th, 1903.

Judgment rendered against Rainey for $2,500 and interest, with foreclosure of attachment lien and directing the issuing of execution and order of sale; and judgment docketed in Judgment Docket.

July 18th, 1903.

The present action (Case No. 4129) commenced by Jesse Hoyt Smith by filing unverified complaint without copy of instrument sued on attached; making Frank Luke only defendant (Tr. folios 2-5).

September 8th, 1903.

Case No. 3958. Sale of premises attached under execution and order of sale issued August 6th, 1903, and prem-

ises sold to Frank Luke and John Luke for debt, interest and cost, and sheriff's certificate of purchase issued to them.

September 23rd, 1903.

Case No. 4129. Amended complaint filed. Allegations same as original complaint except makes John Luke co-defendant with Frank Luke. Complaint unverified and no copy of instrument sued on attached. (Tr. folios 6—10.).

November 28th, 1903.

Case No. 4129. Demurrer to amended complaint sustained.

December 30th, 1903.

Case No. 3958. Execution and order of sale and sheriff's return thereon filed in the office of the Clerk of the District Court of Maricopa County, showing sale of property attached, to Frank Luke and John Luke for the amount of judgment, interest and costs and judgment satisfied in full, and certificate of sale issued.

December 31st, 1903.

Case No. 4129. Second amended complaint unverified filed, to which was attached a copy of alleged contract between Smith and Rainey, which is the foundation of this action. (Tr. Folios 11—19).

June 20th, 1904.

Sheriff's deed issued and delivered to Frank Luke and John Luke conveying undivided one-third interest in premises in controversy.

STATEMENT OF THE CASE AS SHOWN BY THE ABOVE RECORDS.

On the 20th day of September, 1901, Frank and John Luke and one Rainey were residents of Phoenix, Arizona. The records of the Recorder's office of Maricopa County at that time showed that Rainey was the owner of an undi-

vided one-third and Smith was the owner of the other undivided two-thirds of six hundred acres of land near Phoenix. There was nothing of record to show that the interest of Rainey in the land was other than the fee simple of the one-third of the land, and nothing of record to show that Smith had any other interest in the land than the ownership of the remaining undivided two-thirds. The Lukes had no notice, actual, constructive, or to be imputed that Rainey had any less interest than the record disclosed or that Smith had any greater or other interest in the six hundred (600) acres than the undivided two-thirds as disclosed by the record, or had any claim to or lien upon the interest of Rainey in the land, and no notice, actual, constructive or to be imputed of any relation between Rainey and Smith from which there could flow any legal consequence that would give Smith any greater additional or other interest or claim in the lands than the undivided two-thirds thereof, or Rainey any less or other interest than the undivided one-third thereof.

With this state of things existing, the Lukes and Rainey on that day entered into a contract through which Rainey became obligated to the Lukes to pay them some Twenty-five Hundred ($2,500) Dollars. Rainey refused to perform this obligation, and the Lukes on the 11th day of June, 1902, instituted suit in the District Court of Maricopa County against Rainey to recover $2,500.00, and at the same time sued out a writ of attachment.

At this time the Lukes had no notice actual, constructive or to be imputed of any interest of Smith in the land greater or other than that which the deed disclosed, or that Rainey had any other or less, or of any relation between Rainey or Smith, a legal consequence of which could operate to change these interests.

The writ of attachment so sued out was on the 11th day of June, 1902, levied and became a lien in favor of the Lukes to the extent of the money obligation of Rainey to the Lukes as it might thereafter be determined by the court, upon the interest of Rainey in the undivided one-third of said 600 acres of land.

The suit of the Lukes against Rainey came to trial in due course and such proceedings were had therein, that on

the 11th day of June, 1903, judgment was rendered in favor of the Lukes against Rainey for Twenty-five Hundred ($2,500.00) Dollars and their costs, and foreclosing the lien created by the levy of the attachment and an execution and order of sale of all the interest of Rainey in and to said undivided one-third of said 600 acres of land as that interest existed, and was on the 11th day of June, 1902, the day upon which the writ of attachment was levied. And still the Lukes had no notice, actual, constructive or to be imputed of any fact, or of any legal relation of Smith to Rainey, the legal effect of which would be to change the interest of either of them in said lands as disclosed by the deed.

On July 18th, 1903, after the judgment of Lukes against Rainey and the decree establishing the lien on Rainey's individual one-third interest in favor of the Lukes, Smith, the plaintiff in the case at bar, began this action. In this complaint he alleged that he and Rainey became, on the 20th day of March, 1897, the owners of the 600 acres, he, Smith, "being the purchaser of a two-thirds interest and the defendant, William J. Rainey, being the purchaser of the remaining one-third interest in said property." That he, Smith, advanced all of the purchase money, being Eighteen Thousand ($18,000.00) Dollars. That on the day of purchase he (Smith) and Rainey "entered into a written contract wherein and whereby it was, among other things, agreed that plaintiff (Smith) and defendant (Rainey) having joined in the purchase price of said property for the purpose of platting, grading and otherwise improving the property, and as so improved to sell and dispose of the same; that the plaintiff should advance all the money necessary for the improvement of the said property as contemplated by said agreement and that the plaintiff should be repaid for all such moneys so advanced by him either in the purchase of the said property or in advances made for the improvement of said property as rapidly as possible from the receipts from the sale of or sales or other income of said property until the same should be fully paid, with interest at six per cent per annum. And it was therein further agreed that all moneys so advanced by this plaintiff (Smith) as aforesaid shall be considered as loans made by

him, and that if after five years from the date of said agreement all the money or any portion thereof so advanced shall not have been repaid to this plaintiff (Smith), with interest as herein above set forth then that said defendant, William J. Rainey, agrees to pay on demand thereafter said plaintiff (Smith) herein one-third of all such loans then unpaid, including interest thereon as aforesaid." (See original complaint Tr. folio 3).

That complaint then proceeds to allege that since the purchase Smith has advanced for the purchase of the property and for its improvement various sums aggregating, with interest, the sum of Sixty-five Thousand ($65,000.00) Dollars, none of which has been repaid, although demand has been made by Smith of Rainey therefor.

That the plaintiff, Smith, had done all the things he agreed to do by the written contract, but that Rainey has failed and neglected to do so on his part.

That Frank Luke and Lillian Rainey make some claim to the property.

WHEREFORE the plaintiff Smith prays judgment:

1st. That he (Smith) "be declared to have an equitable *mortgage* lien" on Rainey's interest in the property for $21,772.17.

2nd. That he (Smith) be declared to have a *mortgage* lien upon the interest of Rainey superior to any that Luke or Lillian Rainey may have, if any.

3rd. That he have judgment for the amount due him, and

4th. That Luke and Lillian Rainey be foreclosed of any right, title or interest.

No copy of the alleged written agreement was appended to or filed with this complaint, nor was it, nor has it ever been, recorded in the office of the Recorder of Maricopa County, Arizona.

On the 8th day of September, 1903, after levy and due advertisement, the undivided one-third interest of Rainey

in the 600 acres was in manner and form duly sold at public auction by the Sheriff of Maricopa County, under and by virtue of the order of sale thereof decreed by the Court in favor of the Lukes, and the Lukes became the purchasers thereof, and their judgment against Rainey became thereby satisfied. At this time the Lukes had no notice of any interest that Smith might have in or claim upon said lands, excepting that imparted by the recorded deed showing him simply to be the owner of an undivided two-thirds of said 600 acres, and such notice, if any, as might be imputed by the complaint filed by Smith and which we have just quoted.

A certificate of sale was issued by the sheriff to the Lukes in due course.

After the sale, and after the sheriff's certificate had been issued, Smith filed an *amended* complaint against the Lukes in this case. This amended complaint was filed September 23rd, 1903.

The amendment consisted simply in making John Luke a party defendant to the action. The allegations were the same as the original complaint, and no copy of the agreement was filed with or as a part of this amended complaint.

On the 28th day of November, 1903, the demurrer of the defendants Luke to the amended complaint was sustained by the District Court, and that ruling was subsequently approved by the Supreme Court of the Territory, and by the Supreme Court of the United States. (See Smith vs. Rainey, 209 U. S. p. 56).

On the 31st day of December, 1903, the plaintiff filed his second amended complaint in this case. This was after the sale to Lukes and after the return of the execution and satisfaction of judgment.

This *second* amended complaint for the first time pleads the tenor of the alleged written agreement between Smith and Rainey. The allegations of this amended complaint are practically, otherwise, the same as those of the original and the *first* amended complaint.

In this, the second and last amended complaint, the plaintiff Smith prays judgment that he be declared to have

an *equitable mortgage* upon the undivided one-third interest of Rainey in the premises by virtue of the deed from the Arizona Land and Stock Company above mentioned.

A demurrer to this amended complaint was sustained by the District Court; that judgment was affirmed by the Supreme Court of the Territory. These rulings were later reversed by the Supreme Court of the United States upon the ground that the facts pleaded for the first time in the second amended complaint filed on the 31st day of December, 1903, by setting out *in hec verba* the contract sued on, constituted Smith and Rainey partners, and that as a legal consequence Smith had a lien on the land. No other facts, however, were before the Supreme Court of the United States, and that court was careful to refrain from expressing an opinion as to the priority of the partnership lien which it found to exist over any other possible liens or rights, and said:

> "Whether the defendants (the Lukes) nevertheless may not be entitled to priority is not before us now."

Smith vs. Rainey, 209 U. S. 53-56.
See also Alexander vs. Thompson, 111 N. W. 385.

And the Supreme Court of the United States did, in this case, decide that the facts alleged in the *original,* and in the *first* amended, complaint gave no rights to Smith, the plaintiff, as against the Lukes or any one else claiming adversely to him.

BRIEF OF POINTS AND AUTHORITIES.

I.

Real property conveyed to one member of a partnership, and standing of record in his name in which conveyance and record the other partner participates and acquiesces, though purchased with money advanced to the partnership by such participating and acquiescing partner, is subject to

Specification of errors relied upon.

I.

The court erred in holding W. J. Rainey to be a trustee for Smith of an undivided one third of the premises in controversy.

II.

The court erred in holding Smith's alleged partner's lien to be a lien on Rainey's one third interest in the premises in controversy, and in holding such lien to be superior to the Luke's attachment lien thereon.

III.

The court erred in holding that the appellants had notice of Smith's partner's lien prior to their purchase of the premises in controversy at the sheriff's sale, and that such notice rendered such purchase subject to such alleged partner's lien.

IV.

The court erred in holding that paragraph 2703 Rev. Stat. Ariz. 1901 is not applicable to the facts in this case.

V.

The court erred in affirming the decree of the trial court directing the sale of Rainey's one third interest in the property in controversy in satisfaction of the claim of Smith against the alleged partnership of Smith and Rainey.

an *equitable mortgage* upon the undivided one-third interest of Rainey in the property involved, and that the deed from the Arizona Land and Stock Company above mentioned.

II.

A demurrer to this amended complaint was sustained by the court, and upon refusal of appellant to plead further judgment was rendered in favor of appellees. This judgment was reversed by the Supreme Court of Arizona, on the ground that the facts pleaded for the first time in the second amended complaint filed on the 31st day of December, 1903, by setting out *in hæc verba* the contract sued on, showed an equitable mortgage upon the undivided one-third interest of Rainey in the property involved, and that the deed from the Arizona Land and Stock Company above mentioned was executed to appellant to secure the payment of the purchase money. In rendering this opinion the court said:

III.

And the Supreme Court of the United States did, in this case, decide that the facts alleged in the *original*, and in the *amended* complaint, were not sufficient to show that the deed from the Arizona Land and Stock Company to appellant was executed to secure the payment of the purchase money, and that no equitable mortgage was created thereby in favor of appellant, as alleged by him.

IV.

The court erred in allowing the decree of the trial court directing the sale of Rainey's one third interest in the property in controversy in satisfaction of the claim of Smith against the alleged partnership of Smith and Rainey.

Real property conveyed to one partner in his own name and standing of record in his name in which conveyance and record the other partner participates and acquiesces, though purchased with money advanced to the partnership by such participating and acquiescing partner, is subject to

attachment and execution by the creditors of the partner holding such record title who have no notice of such partnership, and the lien of such attaching and execution creditors is prior and superior to the equitable right of such consenting and acquiescing partner to have the partnership property applied to the payment of his advances to the partnership:

Ebberts Appeal, 70 Pa. St. 79.
Appeal 2nd Nat. Bk. Titusville, 83 Pa. St. 203.
Appeal Geddes and Wife, 84 Pa. St. 482.
Stover vs. Stover, 180 Pa. St. 425.
Cundy vs. Hall (57 Atl. 761), 208 Pa. St. 335.
Blake vs. Nutter, 19 Me. 16.
Hammond vs. Paiton, 58 Mich. 393.
Fords vs. Herron, 4 Munf. (Va.) 316.
Buchan vs. Tumver, 2 Barb. 165.
First Nat. Bk. vs. State Nat. Bank, 89 N. W. (Mich.) 941.
Alexander vs. Thompson, 111 N. W. 385.

II.

By participating and acquiescing in the conveyance to Rainey of an undivided one-third interest in the real estate which he advanced the money to purchase, and by participating and acquiescing in placing such title in Rainey of record, and with notice and without protest permitting Rainey to mortgage the property, and otherwise publicly treat it as his own individual property, the plaintiff Smith waived all right to claim a lien upon said premises prior and superior to that of the attachment and judgment creditors of Rainey, who became such upon the faith and credit of such record title, and without notice of the fact of the existence of such partnership or the making of such advances.

R. S. Ariz., par. 753.
Ford vs. Herron, 4 Munf. (Va.) 316.
Wilhite vs. Boulware, 88 Ky. 160 (10 S. W. 629).

"Even when a partner is entitled to a lien, he may waive it, or by his conduct lose its benefit."
30 Cyc. 701.

III.

The evidence does not disclose that there ever was any outward or visible sign of any partnership existing between Smith and Rainey, or any record thereof or any joint occupation of the property, or the existence of any fact which could impart information of the existence of such partnership to the public or persons dealing with said alleged partners.

Under our statutes under such circumstances property standing of record in the names of the individual partner is to be treated in favor of his creditors as his property.

Par 2703, Rev. Stat. Ariz. 1909. (See appendix).

IV.

It is not contended that the Lukes had any notice, actual, constructive, or to be imputed, of the existence of the contract between Smith and Rainey prior to the filing of the complaint in this case on July 18th, 1903.

The lien of the appellants, Frank Luke and John Luke, was fixed by the levy of their attachment, June 11th, 1902, and by the judgment foreclosing that lien, June 11th, 1903.

Hitz vs. Nat. Met. Bank, 111 U. S. 722.
Stevenson vs. Tex. R. R. Co., 105 U. S. 703.
Reed vs. Munn, 148 Fed. 752.
Mansfield vs. Johnson, 40 So. 196.
Wahrenberger vs. Waide, 45 Pac. 518.
Martin vs. Dryden, 1 Gill (Ill.) 187.
Alexander vs. Thompson, 111 N. W. 385.

And notice of a secret equity, received after judgment and before sale does not affect the purchaser, even though such purchaser be the judgment creditor.

Mansfield vs. Johnson, 40 So. 196.
Robertson vs. McClay, 48 S. W. 35.
Meek vs. Skeen, 60 Fed. 322.

The Supreme Court of Texas stands alone in its opinion that secret equities are not within the protection afford-

ed to judgment creditors by the recording acts. But even that Court only exempts from the operation of the recording acts those secret equities which are of such a *nature* that the holder cannot spread his title on the record, and which are not in their *nature* susceptible of registration and of which the purchaser had notice before the sale.

Parker vs. Coop, 60 Tex. 111.
Seuter vs. Lambeth, 59 Tex. 259-263.
Grace vs. Wade, 45 Tex. 522.
Whittaker vs. Farris, 101 S. W. 456.

But the Federal Courts make no distinction between secret equities and unrecorded deeds regarding the time of notice of their existence as affecting purchasers at execution sales.

Baily vs. Greenleaf, 7 Wheaton (U.S.) 46.
Stevenson vs. Tex. R. R. Co., 105 U. S. 703.
Hitz vs. Met. Bk., 111 U. S. 722.
Reed vs. Munn, 148 Fed. 752.

Neither the original complaint, filed July 18th, 1903, or first amended complaint, filed September 23rd, 1903, were sufficient to give to the Lakes constructive notice of the existence of a partnership between Smith and Rainey in respect to the land in question, or to put them upon inquiry in respect to the contract therein mentioned, because said complaints purport to set out all the material provisions of the contract according to their legal effect, and no mention is therein made of any partnership, or of any facts which would constitute the parties to it partners, and the legal presumption arising from such pleading is that the provisions of the contract did not constitute the parties to it partners.

The fact of such partnership being material to plaintiff's cause of action, and neither such partnership or the facts creating it being alleged, such complaint did not state any cause of action.

"Where there is an omission to state a material fact, one necessary to show a cause of action, the pre-

sumption against the pleader is that such fact does not exist."

B. & M. R. R. vs. Lancaster Co., 4 Neb. 307.
B. & M. R. R. vs. York Co., 7 Neb. 487.
McClure vs. Warren, 16 Neb. 447.
C. R. I. & P. R. R. vs. Shepard, 39 Neb. 523.
Marsh vs. Marshall, 53 Pa. St. 396.

VI.

All proceedings under a judgment relate back to the time of the levy.

Freeman vs. Dawson, 110 U. S. 270.
R. G. R. R. Co. vs. Gomild, 132 U. S. 484.

Judgment creditors and purchasers for value are equally protected and judgment lien attaches to whatever title the debtor had of record.

Columbus Buggy Co. vs. Graves, 108 Ill. 459.

ARGUMENT.

I.

The plaintiff's case rests entirely upon the following propositions, viz.: That the contract between Smith and Rainey (Exhibit "A," folios 15-19.) constituted them partners as between themselves in the transaction which was the subject of said contract; that Smith advanced the money to Rainey to pay for his one-third of the property which was the subject matter of the partnership; that in equity one partner has a lien upon the partnership property for his advances to the partnership; that such lien is superior to the lien of the attaching and judgment creditors of the individual partner or the purchaser at the execution sale under such judgment, having notice thereof prior to such sale, and that plaintiff's original complaint gave constructive notice of such partnership, though it did not set forth or state any of the provisions of the contract which constitut-

ed the parties to it partners, because it was within the power of the appellant to compel the production of the contract by application to the trial court for an order upon the plaintiff to produce it.

We do not dispute the general proposition that partnership assets are first to be applied to the payment of the partnership creditors. This arises from the fact that each partner is personally liable for the partnership debts and therefore has an equitable right to have the partnership assets applied to their extinguishment. The partnership creditors have no specific lien on the partnership assets. Their rights are derivative and must be worked out through the equities of the partners between themselves. In the case at bar the United States Supreme Court has declared that Smith and Rainey were, by the terms of the contract, constituted partners in respect of the real estate in question, and that thereby Smith had a lien on Rainey's third of the land for his share of Smith's advances. This we do not dispute. But it must be remembered that the case was before that Court upon demurrer to the plaintiff's second amended complaint, which contained a copy of the contract constituting the parties to it partners. That the right of the appellant—Lukes—were not before that court, and the court was only passing upon the right of Smith against Rainey under their contract as between themselves, and the court is careful to add that it may nevertheless be that that lien is subordinate to the lien of Rainey's creditors. The comparative equities of these parties and the consequent comparative priority of their liens must depend not so much upon the contract between the partners, but upon the manner in which the partners have dealt with the partnership property.

Originally partnership dealings were confined to the holding and dealing in personal or movable property, the title to which depends upon use, possession and personal control and is not of record. Real estate, being immovable, and the title not dependent upon possession or immediate control and the title in modern times being of record, was not regarded as a subject of partnership. The doctrine of the partners' lien grew up at a time when the partnership

property being confined to chattels openly owned by the partnership; used in the partnership business and therefore subject to the equitable lien of the partners. In modern times partnerships have been extended to the ownership of and traffic in real estate and to a modified extent the doctrine of the partners' lien has been extended to such real estate as is purchased with partnership funds and has been occupied by the partnership and used in the partnership business. But this lien as to real estate is confined to the settlement of the partnership affairs AS BETWEEN THE PARTNERS and is never extended to third parties who either have no notice of the existence of the partnership or no notice of the fact that the real estate is partnership property.

Courts have sometimes said that where the partnership funds have been used to purchase real estate and the title is taken in the name of one of the partners, a resulting trust arises therefrom for the benefit of the other partners. Such statements should always be read in connection with the facts in the particular case in which the statement is made. No doubt there are many cases in which the doctrine of resulting trusts is properly applied to partnership real estate, but it can only be properly so applied when the facts bring the case within the general doctrine of resulting trusts.

Constructive, implied or resulting trusts are fictions of the law, adopted to enforce equity between the parties to a transaction, but cannot arise so as to affect third parties except in cases where one party to the transaction has been guilty of fraud, deceit or bad faith toward the other.

> "In the former—resulting trusts—the books sometimes say that the law presumes an intention; but this is a legal fiction, and the real foundation of the resulting or presumptive trust is 'the natural equity' springing into life through fraudulent or inequitable advantages obtained by means of agreements, express or implied, and accompanying acts of the parties."

Kayser vs. Mongham, 6 Pac. 803.

In all the cases in which the doctrine of a resulting trust has been invoked to defeat the right of the creditors

of the party in whom the legal title of real estate stands of record, such legal title has been obtained by the practice of a fraud, actual or constructive, upon the party in whose favor such resulting trust has been declared. As by a husband taking the money of his wife and purchasing property in his own name; or by any one purchasing property in his own name with funds entrusted to him by another, and without his consent; and such trust might perhaps arise where one partner who by virtue of the partnership has possession and control of the funds of the partnership invests them in real estate and takes the title in his own name without the knowledge or consent of his co-partner. In either case the transaction would be a fraud upon the party or partnership whose money purchased the property.

But this principle can have no application to a case like the case at bar, where the party seeking to invoke the doctrine has himself, not only consented to, but taken part in the transaction by which the title to the property in question has been placed in another. As against that other he may still claim a lien on the property which his money has paid for, but that lien will be postponed to the lien of the creditors of the party in whose name the other party has himself placed the title, and upon the faith and credit of which those creditors have become such.

In a well considered case the Supreme Court of Pennsylvania has passed directly on the question involved in the case at bar.

In this case the title to certain real estate purchased with partnership funds was taken in the names of the individual partners without designating them as such. The question arose as to the priority of right between the execution creditors of the partnership, and an execution creditor of one of the partners, and the court say:

> "As between the partners themselves it is perfectly proper to refer a resulting trust for the firm and to treat the proceeds of the land as assets of the partnership where it is clearly shown that they so regarded the title themselves, and had paid for it out of partnership funds. But partners who take a deed

in their individual right as tenants in common, stand in a very different relation to the public. Their act tends to mislead both purchasers and creditors trusting the apparent state of the title. It is unlike a resulting trust for a third party, whom it would be a fraud to deprive of his estate. Hence the trust for him, if valid, would be protected against all persons, except when affected by the recording acts, or a want of notice. But partners being the owners of the money which pays for the title, have the power of directing its application to suit their own purposes, and can, if they choose, always secure the identity of its character, in the kind of title they take for it. If therefore they take the title to themselves as tenants in common instead of as partners, they, by their own selection, stamp the character of the title so taken, AS TO THOSE WHO AFTERWARDS DEAL WITH THEM."

The court then refers to the fact that creditors in Pennsylvania are not within the protection of the recording acts in that state—though they are in Arizona—and proceeds:

"This is very different, however, from parol evidence to alter the effect of the deed itself which displays the title. To alter a deed so as to make it of different import offends against the spirit of all those laws made to protect the public against fraud and secret titles and prevent a change of right to the prejudice of those who deal upon the apparent legal operation of the instrument. The covinous character of the change in the title in such case is of a kind of that forbidden by the Statutes of 13 and 27 Elizabeth, and the Statute of Frauds and Perjuries. * * It is very clear that honest creditors who are led to give credit to the individual partners on the apparent state of the title in them individually ought not to be met afterwards by a change of face in the deed, by which it takes a partnership aspect contrary to its terms."

Ebberts Appeal, 70 Pa. St. 79.

The court will notice that this is the opinion of the highest court of a state in which creditors are "not within

the protection of the recording acts." How much stronger is the case of the creditor in this Territory which by Legislature enactment has thrown the mantle of protection equally around "all creditors, and subsequent purchasers for a valuable consideration without notice," and placed them upon the same basis.

Rev. Stat. 1901, par. 749. (See appendix).

In Cundey vs. Hall, the court says:

"Purchasers and creditors alike may rely upon the title to real estate as shown by the record, and having done so, the law will not permit their rights, acquired on the faith of the title as thus disclosed to be defeated by parol evidence. When parties take title to land as tenants in common and place it upon record, the act, so far as it may affect purchasers and creditors without notice, must be considered as a declaration by the owners of the character in which they intend to hold the property. Creditors of the partnership composed of the individuals who thus hold the title, cannot therefore enforce payment of their claims out of the property as against the individual creditors of the partners. The latter are entitled to have their claims first satisfied out of the proceeds of the property. * * Land granted to the members of a partnership, paid for with partnership money, the deed placed on record, yet nothing on the face of it to show that it is other than the conveyance to an individual, cannot be turned into personality for partnership creditors by parol testimony or secret agreement, to the destruction of the lien of a judgment entered against the individual grantee. * * * It is settled, that when two or more persons who are partners take title to land as tenants in common, the presumption arising from the deed is that they hold the title as tenants in common in equal shares. As between themselves the deed is not conclusive, but they hold in accordance with the facts. As to purchasers and creditors, they hold in accordance with their recorded title. Taking and recording a deed as tenants

in common gives character to the title of the several holders upon which the public may safely rely. They are bound to take notice of what appears upon the records, and they have a right to act upon what they find there."

Cundey vs. Hall, 57 Atl. 761.

We refrain from further quotation upon this point, but the following authorities which have been carefully selected, will be found to fully support our position:

Appeal 2nd Nat. Bk. Titusville, 83 Pa. St. 203.
Appeal Geddes and Wife, 84 Pa. St. 482.
Blake vs. Nutter, 19 Me. 16.
Hammond vs. Paiton, 58 Mich. 393.
Fords vs. Herron, 4 Munf. (Va.) 316.
Stover vs. Stover, 180 Pa. St. 425.
Buchan vs. Tumver, 2 Barbourch 165.
First Nat. Bank vs. State Nat. Bank, 89 N. W. 941

Alexander vs. Thompson, 111 N. W. 385.

We believe the cases above cited are controlling. They are all cases arising out of the record title of real estate purchased with partnership funds, being intentionally taken by the partners in their individual names as tenants in common, and in which the controversy is as to the comparative equities between the creditors of the individual partners, and either the partners themselves or the partnership creditors through them. In every such case it will be found that the individual creditors have been held to have the superior equity.

The cases relied on by counsel for plaintiff are none of them cases arising out of the partnership relation, but are all cases in which the money of one person has been taken to purchase property, and without his knowledge or consent the title has been taken in the name of another. Such cases are clearly distinguishable from the case at bar.

Should this court adopt the views so clearly expressed in the cases above cited and quoted from, all further argu-

ment is unnecessary, as all questions of constructive or resulting trusts and of notice are eliminated.

II.

Whatever lien the law may give to Smith upon Rainey's undivided one-third interest in the property, by virtue of their alleged partnership in regard thereto, we think that Smith has waived that lien and estopped himself by his conduct from asserting it against the judgment creditors of Rainey. He participated and acquiesced in having a definite portion of the title to the premises conveyed to Rainey in his individual name by the same instrument by which he himself acquired a definite portion of the title in his own individual name, and which conveyance contains no suggestion of a partnership. He acquiesced and participated in placing that conveyance of record, thereby declaring to the public that Rainey was the owner in his individual right of an undivided one-third interest in the premises. Without protest he permitted Rainey to treat the title thus conveying to him as his own, by executing and recording a mortgage thereon to A. G. Hubbard for $3,000, in which mortgage Rainey declared himself to be the exclusive owner of said undivided one-third interest, with good right and lawful authority to convey and mortgage the same, with full covenants of warranty. He permitted the title so conveyed to Rainey to so remain of record that upon the faith and credit thereof the Lukes so dealt with Rainey that he became indebted to them, and with the contract in writing constituting himself a partner with said Rainey in respect to said premises in his exclusive possession capable of being recorded, he kept it off the record and concealed until the rights of the appellant had become fixed and their lien perfected by attachment and judgment.

We think by his conduct Smith has waived his lien as to the creditors of Rainey and has estopped himself from asserting it against them.

Alexander vs. Thompson, 111 N. W. 385.

III.

It will be noted that there were no facts outside of the contract, which was in Smith's exclusive possession, to put

the Lukes upon notice of the existence of any partnership relation between Smith and Rainey. No partnership articles were of record. No partnership name or title was adopted or used in the transaction of their joint business. In fact, the terms of the contract contemplate that Rainey shall have exclusive charge and control of the enterprise and possession of the property, as it provides for Rainey's exclusive operation and control, and his report to Smith of his operations (folios 16–17). We insist that it is the policy and purpose of the recording acts of this Territory and of our statutes regarding partnerships and partnership property that every man shall disclose his estate for the benefit of his creditors or those who may become such upon the faith and credit of his estate thus disclosed. To this end our recording acts declare all unrecorded conveyances void as to creditors; partnerships are required to set forth of record the names and residences of all the members of such partnerships (R. S. par. 3520), and under the head of Frauds and Fraudulent Conveyances if any partner in a partnership do business in his own name or with a fictitious or formal addition thereto which does not reveal the names of his partners, all property standing in his name is declared to be subject to his debts, to the exclusion of the debts of such partnership. (R. S. par. 2703. See appendix).

It seems to us that this statute is conclusive of this case, and that the Lukes as creditors of Rainey are directly within its letter and spirit. Rainey was by the terms of the contract to conduct the business of the partnership in his own name and he did so conduct it without any reference to Smith whatever. The property attached and sold under the judgment foreclosing the attachment was standing in the name of Rainey, and by the terms of this statute is to be treated as to his creditors as his property, and we think the condition was just such as the statute above cited was designed to meet, and that this statute is conclusive of this case.

This section of our statute was first adopted by this Territory by Act No. 8, page 6, Laws of 1891. It was adopted from the Statutes of Mississippi and is a verbatim copy of Sec. 1300 of the Revised Statutes of that State of 1880.

Prior to its adoption by this Territory, that state had repeatedly construed the statute.

In Gumbel vs. Koon, the Supreme Court of that state, in considering the statute, says:

> "The object of the statute was to prevent the assertion of secret claims to property as against creditors of the person who seems to be the owner of it, evidenced by his dealings with it, and it *conclusively* fixes the ownership to be in the person whose sign is exhibited at the place where the business is conducted, or who, in the absence of any sign, is the manager of the business."

Gumbel vs. Koon, 59 Miss. 264.

In Howe vs. Kerr, the same court says:

> "The uncontradicted evidence is that Kerr transacted the business in which he was engaged, in his own name, and that no sign was displayed at the place disclosing that Montgomery had any interest therein, and that the property was used and acquired in that business. Under these circumstances, such property is, by express provision of the statute, liable for the debts of the person so transacting the business, and to be 'in all respects treated in favor of his creditors, as his property.' "

Howe vs. Kerr, 69 Miss. 311.

In the case at bar the very contract which it is claimed constitutes the parties to it partners shows that the plaintiff Smith was a resident of Wisconsin and Rainey a resident of Ohio. That Rainey was to go to Phoenix, Arizona, and take charge of the enterprise (folio 16). That he should have the general management of the business, make all contracts, hire all labor, and handle and sell the property (folio 17). The contract does not contemplate that Smith shall take any part in the enterprise except to furnish the funds and receive his share of the profits, because Rainey is to report to Smith on the 10th day of each month and

give a full account of his receipts and disbursements on account of the enterprise. There can be no doubt that Rainey was transacting the business in his own name within the meaning of the statute referred to and that, at least the property standing of record in his name, and which he mortgaged in his own name, and in which mortgage duly recorded he covenanted that "he is well and truly seized of a good and perfect title to the premises above conveyed, in law in fee simple, and has good right and lawful authority to convey the same," is subject to his debts.

IV.

The Territorial court found that the appellants—Lukes—had no notice of the existence of the contract between Smith and Rainey except such as was conveyed to them by the pleadings in this case (folio 102), but that, as a conclusion of law, the original complaint by its statement of the existence of the contract between Smith and Rainey, placed the Lukes upon inquiry and gave them constructive notice of all the provisions of the contract (folio 23-70).

As we have already shown, we think the question of notice is not in this case, and that it is immaterial whether the original complaint gave such constructive notice or not, because that original complaint was filed July 18th, 1903, whereas the Lukes' attachment was levied June 11th, 1902, and judgment foreclosing the lien of that attachment and ordering sale of the premises was entered June 11th, 1903, by virtue of which the rights of the Lukes were fixed and determined and could not be affected by any notice actual or constructive.

From the numerous authorities upon this point cited in our brief we select the following for quotation, viz.:

> "As the deed of trust in question was not recorded until several weeks after the judgment of the bank against Hitz was recovered, and as there is no evidence that the bank ever had actual notice of its existence until after execution was issued and levied on Hitz's interest in the property, we entertain no doubt but that

the conveyance would be ineffectual against the bank, or any purchaser at the sale under that judgment."

Hitz vs. Nat. Met. Bank, 111 U. S. 722.

"A creditor, therefore, who attaches real estate standing upon the records in the name of the attachment defendant, acquires a lien upon the property attached, by virtue of the statute, which takes precedence of an outstanding unrecorded title or interest, provided the attachment is made without notice or knowledge of the outstanding title or interest."

Wahrenberger vs. Waide, 45 Pac. 518.

"The notice given on the day of sale was unavailing, because the rights of the purchaser at the sale, whether such person be the execution creditor or a third person, are fixed by the status existing at the time the lien is acquired, and not by the status existing at the time of the sale. * * * If at the time the lien is acquired the creditor has no notice, actual or constructive, of equities of third persons in real estate the title to which stands in the name of the judgment debtor as the apparent absolute owner, the purchaser at the execution sale thereof takes a good title and is protected as a bona fide purchaser, even though the creditor or purchaser had notice of the equities of others at the time of the sale."

Mansfield vs. Johnson, 40 So. 196.

But we think the court is clearly in error in holding that the original complaint gave to the Lukes constructive notice of the existence of a partnership between Smith and Rainey, from which relationship all alleged rights of Smith must flow.

A reading of the allegations of the original complaint filed July 18th, 1903, and of the amended complaint filed September 23rd, 1903, shows that the contract relied upon as the foundation of the plaintiff's right is attempted to be

set forth, not IN HEC VERBA, but according to its LEGAL EFFECT. It purports to set forth and describe all the covenants, agreements and provisions of the instrument according to their legal effect and the result of ALL its provisions so set forth is declared to be to create a MORTGAGE LIEN on the premises, which they ask to have foreclosed. In the whole pleading no suggestion is made of a trust, or of any fact or covenant or provision in the contract which would constitute the parties partners. The pleading, after reciting the conveyance to Smith and Rainey of several interests in the property, sets forth that the written contract was that Smith should advance all the money necessary for the improvement of the property, and that one-third of all the money advanced, either for purchase or improvement, shall be repaid by Rainey, if not previously repaid out of sales of the property; and that under that contract Smith had advanced for the purchase and improvement of the property $65,316.51.

These provisions of the contract did not constitute a partnership.

The Supreme Court of the United States had previously decided that such agreements and provisions do not constitute the parties partners.

Clark vs. Sidway, 142 U. S. 682.

And in the case at bar, after reciting all these facts, which were the only ones stated in the original complaint and were relied on by counsel for Smith in that court, the court declares that all these facts not only did not create a partnership, but did not create any lien at all, but only a personal undertaking, with an indication of a fund as the limit and only source of repayment, until the five years should have elapsed.

Smith vs. Rainey, 209 U. S. 43.

Where the pleader declares upon a written contract by its legal effect it will be presumed that he has stated all the essential elements of the writing; that he has stated its

provisions correctly, and failure to allege any fact material to the remedy he seeks raises the presumption that such fact does not exist.

C. R. I. & P. R. R. vs. Shepard, 39 Neb. 523.
Marsh vs. Marshall, 53 Penn. 396.
Hughes vs. Murdock, 45 La. 935.
McClure vs. Warren, 16 Neb. 447.

A writing declared on but not set out IN HEC VERBA or with copy attached, must be taken to be as set out in the declaration.

"The writing declared on, not being made a part of the record, we must assume it to be correctly set forth in the declaration."

Pollard vs. McClain, 10 Ky. 24.

"Where the party states and names the right under which he holds, such information will not excite inquiry as to any other or different right."

Fire Ass'n vs. Flournoy, 84 Tex. 632.

In this case the written instrument which it is claimed reveals the existence of a resulting trust in the premises in controversy in Smith, was in Smith's exclusive possession. He declared upon it in this case, but studiously avoided attaching a copy to his complaint; or his first amendment thereof, but assumed instead to state its provisions. We had a right to assume that all of the provisions of the contract, so far as they had any legitimate bearing upon the rights of Smith thereunder, were set out in these pleadings. One who assumes to set out a written instrument according to its legal effect instead of attaching a copy to his pleading, and omits to state the very provisions which form the basis of his alleged right, convicts himself either of ignorance or duplicity. If we are to be charged with notice of a resulting trust in this case, it is on the theory that we have received such information as would put a prudent man upon

further inquiry, and that we have been guilty of negligence in not doing so. Can it be negligence to believe and rely upon the written statements of the party having the exclusive possession of the instrument as to what its provisions are? And can such negligence be imputed to us by and for the benefit of the party who has made the statements because the statute gives us the right to go to the court in which the cause is pending, and get an order for the inspection of the papers? We had a right to rely upon the statement of the pleader and to believe that every material provision of the contract had been set forth according to its legal effect. To permit the party who has made a written statement to us of the provisions of the contract in his exclusive possession, and under which he claims his right, to charge us with negligence for not invoking the aid of the court to compel the production of the contract that we might see whether or not he has correctly stated it, is to permit the party to take advantage of his own wrong; to place a premium on duplicity, and to make the pleading in a case a snare and a delusion, instead of a "statement of the facts constituting the plaintiff's cause of action or the defendant's ground of defense," as provided by paragraph 1277, R. S.

We think the law is otherwise, and we are not without judicial authority upon the point.

In Converse vs. Blumrich, the court says:

> "As between himself and Converse, Blumrich had fully discharged his duty by making the inquiry; and the former will not be heard to claim that Blumrich should have received and acted upon prior information, instead of the positive statements made by himself to the contrary. When one seeks the best authority to ascertain the truth of rumors, and is there misled, the person misleading him can hardly be allowed to support rights by insisting that he should still be chargeable with the reports which he had endeavored in vain to verify. The law of constructive notice can never be so

applied as to relieve a party from responsibility for actual mis-statements and frauds."

Converse vs. Blumrich, 14 Mich. 108-120.

The case of Dickey vs. Henarie, 15 Pac. 464, is in principle directly in point. The facts briefly were: Martin owned a leasehold interest in a building in Portland, Oregon. Martin sublet a portion of the building to Dickey for a cigar store, which sub-lease was in writing but not recorded. It gave to Dickey the *exclusive right* to sell tobacco and cigars in the whole of the building. Dickey was in possession of the portion he had leased. Creditors of Martin attached his interest in the building. At the sheriff's sale under the attachment Dickey gave notice to the sheriff and bidders that he had a sub-lease of the cigar store, which was in writing. The attaching creditors purchased at the sheriff's sale and took possession of the building, but recognized Dickey's sub-lease of the cigar store, but refused to recognize his *exclusive right* to the sale of tobacco and cigars in the whole building.

It is impossible to quote intelligently from the opinion without setting out the whole of it, but the court held the attaching creditor, who was the purchaser at the sale, was only charged with notice of the provisions of the written lease so far as they were stated by Dickey at the sale; that he was not put upon inquiry as to the contents of the writing for the reason that the party in possession of the instrument had stated to the purchaser what its provisions were and he had a right to rely on such sttaement.

In the case at bar the plaintiff in declaring on his contract set forth none of these provisions which could constitute the parties to it partners, and from which relation all his rights in the property against the Lukes, if any, must flow. There is no reference whatever to the provisions of the sixth, seventh, eighth and ninth clauses of the contract, which, as this court points out, are the only ones which constitute that relation.

It is a significant fact that the sheriff's return of the execution showing the sale to the Lukes, and the satisfaction

thereby of their judgment was filed in the Clerk's office on December 30th, 1903, and THE NEXT DAY on December 31st, 1903, the plaintiff amended his complaint, and for the first time exhibited the contract by attaching a copy thereto.

This was the first notice the Lukes ever had, either actual or constructive, of those provisions of the contract which constituted the parties to it partners, and that this was too late to affect the rights of the parties, even the Texas authorities relied on by plaintiff, fully agree.

In the court below the plaintiff relied upon the theory that the contract between Smith and Rainey, by constituting them partners in respect to the land in controversy, created a resulting trust in Rainey for the benefit of Smith.

If this argument were sound, it is inconsistent with the plaintiff's complaint and the judgment in the case, and must result in a reversal. If by reason of the fact that Smith advanced money to the partnership for the purchase of the land in controversy, it results that the one-third interest conveyed to Rainey is held by him in trust, it is so held in trust for the partnership, not for Smith. It would also result that the two-thirds interest conveyed to Smith is held by him in trust for the partnership and Smith's lien for advances is upon the whole property of the partnership and not upon the one-third interest conveyed to Rainey alone.

Smith vs. Rainey, 209 U. S. 53.

But the resulting trust theory is not only inconsistent with the pleadings and judgment in the case, but is inconsistent with the admitted facts.

The court will remember that, though this contract bears date March 20th, 1897, the same date the deed of the property to Smith and Rainey was executed and recorded, the Territorial Court found that the contract was not executed or delivered until April 29th, 1897. (Tr. folio 95).

Now it is well settled that a resulting trust must come into existence at the very moment of the passage of the title of the property and that no subsequent agreement can create such trust. The following quotation from Perry on

Trusts would seem to indicate that the plaintiff must seek his remedy by other theories than that of a resulting trust:

> "The trust must result, if at all, at the instant the deed is taken, and the legal title vests in the grantee. No oral agreements, and no payments, before or after the title is taken, will create a resulting trust, unless the transaction is such at the moment the title passes that a trust will result from the transaction itself. Thus if two agree to purchase and one furnishes all the money and takes the title to himself, no trust results to the other. AND SO IF TWO AGREE TO PURCHASE AND ONE PAYS THE WHOLE CONSIDERATION MONEY AND THE TITLE IS TAKEN TO THE TWO, NO TRUST RESULTS TO THE ONE WHO PAID THE WHOLE. He can only enforce repayment of one-half the consideration money."

3rd Ed. Perry on Trusts. Sec. 133.

This is exactly our contention. What Smith has, and what the United States Supreme Court says he has, is a LIEN. He is a lien holder, not a CESTUI QUE TRUST. He is therefore not within the doctrie of the Texas cases relied on by counsel for plaintiff, which are cases in which the party held not to be affected by the recording acts, was clearly a CESTUI QUE TRUST and not a lien holder. The plaintiff is the holder of a secret lien, created by an unrecorded instrument in writing—good against Rainey, but void as to all creditors and subsequent purchasers without notice by virtue of par. 749, Rev. Stat. Ariz., and is clearly within the construction of that statute by the Supreme Court of Texas.

Grace vs. Wate, 45 Tex. 522.
Simpson vs. Chapman, 45 Tex. 566.
Murphy vs. Smith, 50 T. W. 1042.
Grimes vs. Hobson, 46 Tex. 419.
Lewis vs. Johnson, 68 Tex. 448.
Stephens vs. Keating, 17 T. W. 37.

Cent. City, etc., vs. Waco Bldg. Assn., 64 S. W. 998.
Turner vs. Cochran, 63 S. W. 153.
Meek vs. Skeen, 60 Fed. 325.
Stevenson vs. Texas R. R. Co., 105 U. S. 707.
Pugh vs. Highley, 152 Ind. 258.

We concede that Section 749 of our statute is, in all its essentials, taken from the Statutes of Texas.

It will be noted that the statute makes all mortgages *whatsoever* void as to all creditors and as to subsequent purchasers for value without notice. By this statute *all* creditors, with or without notice, are protected against unrecorded mortgages, but as to subsequent purchasers only those are protected who are purchasers for value without notice.

This statute was construed by the Supreme Court of Texas in 1876, prior to its adoption by this Territory, in a case in which the only point in issue was whether the creditor who had no notice of the unrecorded instrument when he acquired his lien, but did have such notice before the sale, was protected by the statute. And this case was reviewed by the Supreme Court of the United States in 1881 in construing the same statute, and the construction placed upon it by the Texas Court is specifically approved and adopted.

Grace vs. Wade, 45 Tex. 522.
Stevenson vs. Tex. R. R. Co., 105 U. S. 703.

In the Texas case above cited the court, after construing the statute referred to, says:

"Now, if the unrecorded instrument cannot take effect, but is void as to creditors, it is absurd to say that the right acquired by the creditor by his lien, not merely to purchase himself, but to have the land sold in open market, when once secured, can be taken away by the subsequent record of such instrument, or that the party holding such lien can, by subsequent notice, be precluded from the full benefit of his lien for the satis-

faction and discharge of his demand, except by becoming himself the purchaser."

And this language is quoted with approval by the Supreme Court of the United States in the case above referred to.

And the Texas Court in the case above cited further says:

> "The statute, in plain and unmistakable language, says that unrecorded conveyances, whether by deed or bond, are void as to two classes of persons, viz.: 'all creditors' and 'subsequent purchasers for valuable consideration without notice.' Now, it will be noted that there is a marked distinction between these two classes of persons for whose benefit the statute was enacted; for while such unrecorded instruments are void as to 'all creditors,' they are only so as to 'purchasers for a valuable consideration and without notice.' And lest there might be any uncertainty in its proper construction, and to guard against all danger of confounding the two classes, as to whom such instrument was declared void, without making any qualification or restriction as to creditors, it enacts, that as to the parties to such instruments, and their heirs, and all subsequent purchasers with notice, and without valuable consideration, they shall be valid."

To quote further from these cases would only tend to unnecessarily lengthen this brief.

But counsel now seek to avoid the force of these decisions by receding from his construction of the instrument declared on as shown in the complaint and his former briefs, and now declaring that the instrument is not a mortgage, but that it creates a trust estate in Rainey, and that the Texas Courts have declared that trust estates are not affected by the provisions of Par. 749, and in support of this contention counsel relies on the following Texas cases:

Blankenship vs. Douglas, 26 Tex. 226.
Ayres vs. Duprey, 27 Tex. 593.
Senter vs. Lambeth, 59 Tex. 259.

The first two cases above cited were decided prior to

Grace vs. Wade and are commented upon in that case.

In Blankenship vs. Douglas, one J. J. Blankenship bought real estate for David Blankenship with money in his hands belonging to David Blankenship and took the title in the name of J. J. Blankenship, and the court held that thereby a resulting trust arose and J. J. Blankenship held the title in trust for David Blankenship, and that the property was not subject to execution for the debts of J. J. Blankenship, but would be subject to execution for the debts of David Blankenship.

In Ayres vs. Duprey, the court points out the difference in the protection afforded by the statute to a "creditor" and a "purchaser." It has no reference whatever to trusts or equities, and has no bearing on the case.

The case of Senter vs. Lambeth, 59 Tex. 259, is much relied on by counsel for plaintiff, but we think it supports our contention and clearly points out the only class of trust estates which are held not to be within the provisions of the recording statute and the reason therefor. The contest in this case was between the holder of a vendor's lien not evidenced by any writing whatever and an attaching creditor without notice at the time of the attachment, but with notice at the time of the sale, and the court says:

> "The evidence of the vendor's lien in this case was not recorded, nor was it, in the form in which it existed (being the lien springing by operation of law out of the transaction between the parties) SUSCEPTIBLE OF REGISTRATION."
>
> (Here the court cites Texas cases holding attachment liens superior to unrecorded liens or conveyances.)
>
> "These decisions only apply to cases where the third party to be affected by the unrecorded conveyance acquired thereby the legal title; or WHERE HIS RIGHT OR INTEREST IS REPRESENTED BY SOME WRITTEN INSTRUMENT, THAT IS REQUIRED OR PERMITTED BY LAW TO BE RECORDED, AND WHICH HE HAS NEGLECTED TO RECORD, and of which the judgment creditor had no

actual notice at the date of the acquisition of his lien.

"The court has never held that the doctrines above announced applied to cases where the rights of a third party, as in this case, for example, claiming through or under the judgment debtor, were purely equitable in their character, AND WHICH WERE NOT IN THEIR NATURE SUSCEPTIBLE OF REGISTRATION, when actual notice of such equitable title was brought home to the purchaser before the sale and purchase."

Here the court points out the basis and prescribes the limit of the doctrine of the protection of equitable estates from the operation of the recording acts. The basis is the absolute impossibility of placing the trust estate of record, for the reason that it is not susceptible of recording because there is no instrument in writing creating it, but it arises by operation of law. But, as the court puts it, "where his right or interest is represented by some written instrument that is required or permitted by law to be recorded, and which he has neglected to record," the decision in Grace vs. Wade applies, and the recording act affords protection to *all* creditors, whether they have notice or not.

We think therefore that under the Texas doctrine, though it be the only state that exempts *any* trust estates or equitable rights from the operation of the recording acts, the equitable mortgage or lien claimed in this case, being evidenced by an instrument in writing susceptible of acknowledgment and registration, and which our statutes permit to be recorded (95 Pac. 180, Ariz.), and which the plaintiff has neglected to have acknowledged or recorded, is subject to the lien of an attaching creditor, whether he have notice of such instrument before the sale or not.

In support of this position we rely on the following authorities:

Grace vs. Wade, 45 Tex. 522.
Senter vs. Lambeth, 59 Tex. 259.
Stephenson vs. Tex. R. R. Co., 105 U. S. 703.
Mansfield vs. Johnson, 40 So. 196.
Wahrenberger vs. Waide, 45 Pac. 518.
Houston vs. McCluney, 8 W. Va. 135.

The last case cited (8 W. Va. 135) is so nearly parallel with the case at bar as to its facts, and is so well reasoned, that we trust the court will give it careful attention.

There is no force in the argument of counsel that the instrument was not acknowledged and therefore could not be recorded.

That it was not acknowledged was the fault of appellee and not of appellant Luke. Moreover the Supreme Court of Arizona has decided that an unacknowledged contract is entitled and permitted to be recorded under our statutes.

Nat. Cash Reg. Co. vs. Bradbury, 95 Pac. 180.

IV.

We desire to call the attention of the court to one other point only.

The court will note that the plaintiff has declared on the written instrument, and in his pleading has characterized it as creating a mortgage lien upon the property of Rainey which he asks to have foreclosed. But to evade the provisions of Par. 749 regarding the recording of mortgages, it is now claimed that the plaintiff's lien is not dependent upon the written instrument, but exists as a partner's lien independent of the writing. And this, notwithstanding that the Supreme Court of the United States has declared that "taking the instrument as a whole, we are of opinion that *it* (the instrument) gives the appellant a lien. Whether the defendants nevertheless may not be entitled to priority, is not before us now."

Smith vs. Rainey, 209 U. S. 56.

Now, if the lien exists by virtue of the writing only, it is a mortgage lien and may be foreclosed. But if the lien now claimed by Smith exists independent of the writing, then it must be simply the partner's equitable lien. This equitable lien is not a specific lien of one partner upon that portion of the partnership assets standing in the name

of one of the other partners, but is a general lien upon all the assets of the partnership. It is in fact only a right to have all the partnership assets applied to the payment of the partnership debts, among which may be a debt due to one of the partners. The partner's lien cannot be enforced against one of the individual partners, but can only be availed of by a dissolution of the partnership, an accounting between the partners, and the sale of all the partnership assets.

We call attention to this matter only for the purpose of showing that the plaintiff Smith has pursued his remedy in this case on the theory that the lien he claims is not the equitable lien upon all the partnership assets growing out of the partnership relation, but a specific lien upon a particular item of alleged partnership property standing in the name of the individual partner. Therefore the lien for which the plaintiff has sought and obtained a decree of foreclosure, is a specific lien on specific property, created by an instrument in writing permitted and required to be recorded, and which the plaintiff has neglected to record, and is directly within the terms of the decisions of the Supreme Court of Texas construing Sec. 749 of our Revised Statutes of 1901.

In this connection, too, we respectfully suggest that the decision of the Territorial Court in this case does not seem to be in accord with former holdings of that court.

In the case of Baker vs. Fleming, this court had under consideration the question whether the doctrine of vendors' lien should obtain in this Territory. Or, as stated by the court, "whether a grantor of real estate by absolute conveyance has an implied equitable lien thereon for the unpaid purchase money. If such a lien arises at all, it must, on principle prevail alike against the grantee himself and all subsequent purchasers with notice."

In denying the existence of such lien this court quotes with approval the following language used by Chief Justice Marshall in Bailey vs. Greenleaf, 7 Wheat. 46:

> "It is a secret, invisible trust, known only to the vendor and vendee, and those to whom it may be com-

municated in fact. To the world, the vendee appears to hold the estate devested of any trust whatever, and credit is given to him in the confidence that the property is his own in equity as well as law. A vendor, relying upon this lien, ought to reduce it to a mortgage, so as to give notice of it to the world. If he does not, he is in some degree accessory to the fraud committed on the public, by an act which exhibits the vendee as the complete owner of an estate on which he claims a secret lien."

And again the same court quotes with approval the following language by Judge Gray (afterward of the United States Supreme Court) in a Massachusetts case in which the question of secret (vendor) liens was under consideration:

"If no third person has acquired any rights in the land by *bona fide attachment or conveyance,* the original vendor may secure payment of the debt due him for the purchase money by the usual attachment or mesne process. If any third persons has acquired rights in the property, there is no reason why equity, any more than the common law, should interpose to defeat them."

And in expressing its opinion in the case cited, the same court says:

"After giving to the question the deliberate consideration which its importance demands, we are forced to the conclusion that this principle of an implied lien for purchase money can have no just application in this Territory. It is opposed to the policy of our legislation, which aims to make the title to real estate as simple and easily understood as possible, and to facilitate its transfer and improvement by discouraging all secret or latent equities, and requiring conveyances and encumbrances thereof to be made matters of public record. Here, our attachment law readily permits a debt to become a lien before judgment, and debts generally are a lien upon the lands of decedents. The doctrine

being thus repugnant to our registration law, ill-suited to our condition, and by no means essential to the interests of justice, we ought not to adopt it."

Baker vs. Fleming, 6 Ariz. 418.

It seems to us that the decision of the court in the case at bar is incompatible with the principle announced in the Baker case.

The argument that the sheriff, in levying the attachment in this case, did not levy on the property, or Rainey's one-third interest in it, but only on "all the right, title and interest" of Rainey ,in the property, the levy only attached to the real interest of Rainey, instead of to the title in him disclosed by the record title, is futile. It is fully answered by the court in the case of Meek vs. Skeen, 60 Fed. 325, above cited, and no further answer or argument is necessary.

For the convenience of the court we append a reference to the Sections of the Statutes of the Territory of Arizona referred to in this brief.

Respectfully submitted,
WALTER BENNETT,
Attorney for Frank and John Luke, Appellants.

APPENDIX.

The following is copy of the Sections of the Statutes of Arizona referred to in this brief and affecting the questions therein discussed:

Paragraph 358.

The execution of the writ of attachment upon any property of the defendant subject thereto, unless the writ should be quashed or otherwise vacated, shall create a lien from the date of such levy on the real estate levied on, and on such personal property as remains in the hands of the attaching officer, and on the proceeds of such personal property as may have been sold.

PARAGRAPH 749.

All bargains, sales and other conveyances whatever, of any lands, tenements and hereditaments, whether they may be made for passing any estate of freehold or inheritance or for a term of years; and deeds of settlement upon marriage, whether land, money or other personal thing, and all deeds of trust and mortgages whatsoever, which shall hereafter be made and executed shall be void as to all creditors and subsequent purchasers for valuable consideration without notice, unless they shall be acknowledged and filed with the recorder, to be recorded, as required by law, or where record is not required deposited and filed with the recorder; but the same, as between the parties and their heirs, and as to all subsequent purchasers, with notice thereof, or without valuable consideration, shall nevertheless be valid and binding.

PARAGRAPH 2703.

If any person shall do or transact business as a merchant or trader, with the addition of the words agent, factor, or company, or and Co., or words of like significance or import, and shall fail to disclose the name of his principal or partner or other person who may be interested in such business by a sign in letters easy to be read, placed conspicuously at the place where such business is transacted; or if any person shall transact business in his own name, without any such addition, all the property, stock, money and choses in action used or acquired in such business, except such property as may be exempt from execution, shall, as to the creditors of any such person, be liable for his debts, and be, in all respects, treated in favor of his creditors as his property: *Provided*, That this title shall not apply to co-partners who have complied with the provisions of title 51 of the Revised Statutes of Arizona.

TITLE LI.

PARTNERSHIPS.

3520. (Section 1). (Except as otherwise provided in the next section) every co-partnership transacting business

in this Territory under a fictitious name, or a designation not showing the names of the persons interested as partners in such business, must file with the Recorder of the County in which such place if business is situated a certificate stating the names in full of all the members of such partnership and their place of residence.

3521. (Sec.) A commercial or banking partnership established and transacting business in a place without this Territory may, without filing the certificate prescribed herein, use in this Territory the partnership name used by it there, although it be fictitious or do not show the names of the persons interested as partners in such business.

3522. (Sec. 3). The certificate filed with the Recorder, as provided herein, must be signed by the partners and acknowledged before some officer authorized to take the acknowledgment of conveyances of real property. Persons doing business contrary to the provisions of this title shall not maintain any action upon or on account of any contract made *of* transactions had in their partnership name in any court of this Territory until they have first filed the certificate herein required.

3523. (Sec. 4). On every change in the members of a partnership transacting business in this Territory under a fictitious name, or a designation which does not show the names of the persons interested as partners in its business, except in the cases mentioned herein, a new certificate must be filed with the Recorder, as required by this title, on the formation of such partnership.

3524. (Sec. 5). Every County Recorder must keep a register of the names of firms and persons mentioned in the certificates filed with him pursuant to this title, entering in alphabetical order the names of every such partnership and of each partner therein.

(Took effect September 1, 1901.)